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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

No. 228.

THE AMERICAN HARROW COMPANY, APPELLANT,

vs.

JOSEPH B. SHAFFER, COMMISSIONER OF THE REVENUE OF WYTHE COUNTY, VIRGINIA; J. L. GLEAVES, THE ATTORNEY FOR THE COMMONWEALTH FOR SAID COUNTY, AND I. R. HARKRADER, SHERIFF OF THE SAID COUNTY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF VIRGINIA.

FILED FEBRUARY 18, 1895.

(15,798.)

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JULY 3, 1896.

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1 In the Circuit Court of the United States, Western District of Virginia, *To wit:*

At a circuit court of the United States for the western district of Virginia, in the fourth circuit, continued and held at Abingdon on the 25th day of January, in the year of our Lord one thousand eight hundred and ninety-five—present, the Honorable John Paul, district judge of the western district of Virginia—among others were the following proceedings, to wit:

AMERICAN HARROW COMPANY, Complainant,
vs.
JOS. B. SHAFFER, Commissioner, *et al.*, Defendants. } In Equity.

Attorneys for complainants in error, Blair & Blair, Wytheville, Va.

For defendants in error, R. Taylor Scott, att'y gen'l of Va., Richmond, Va.

2 *Petition on Appeal. Filed Jan. 25th*, 1895.

In the Circuit Court of the United States for the Western District of Virginia, at Abingdon. In Equity.

THE AMERICAN HARROW COMPANY, Complainant,
vs.
JOS. B. SHAFFER *et als.*, Defendants. } Case #—.

The above-named plaintiff, conceiving itself aggrieved by the decree made in this court and entered on the 24th day of January, 1895, in the above-entitled cause, does hereby appeal from said order and decree to the Supreme Court of the United States for the reasons specified in the assignment of errors, which is filed herewith, and it prays that this appeal be allowed, and that a transcript of the record, proceedings, and papers upon which said order was made, duly authenticated, may be sent to the Supreme Court of the United States, at Washington, D. C.

F. S. BLAIR AND
JOHN C. BLAIR,
Attorneys for the Plaintiff.

Dated Abingdon, Va., 25th day of Jan., 1895.

The foregoing claim of appeal is allowed this the 25th day of Jan., 1895, bond in penalty of $500 being required to cover costs, to operate as supersedeas.

JOHN PAUL,
Dist. Judge.

3 *Assignment of Error on Appeal.*

In the Circuit Court of the United States for the Western District of Virginia, at Abingdon.

THE AMERICAN HARROW COMPANY, Complainant,
vs.
JOS. B. SHAFFER *et als.*, Defendants. } In Equity.

And now, on this 24th day of January, 1895, came the said plaintiff, by F. S. Blair and J. C. Blair, its solicitors, and its says that the decree entered in this cause on January 24, 1895, dissolving the plaintiff's injunction is erroneous and against the just rights of the said plaintiff, and it assigns the following errors:

First.

Sections 108 and 109 of the Virginia license law of the Acts of Assembly 1889–1890, p. 240, are unconstitutional because it discriminates against plaintiff in the matter set up in the bill. The plaintiff was a manufacturer of agricultural implements at Detroit, Michigan, and sold its manufactured articles in Virginia in the manner stated in the bill. The Virginia license law named required the plaintiff, as a non-resident manufacturer, to pay a specific
4 license tax of $30.00, which gave it a right to sell its manufactured articles only within the county in which it took out its license, and by one agent, and if it should sell in any other counties or corporations of the State it was required to pay an additional tax of $10.00 for each additional county or corporation where it sold or offered to sell its manufactured articles, and this tax mentioned limited the privilege to the plaintiff and one agent in the said county named, where the license was taken out, and an additional tax of $10.00 was likewise required for each additional agent for each additional county or corporation. Now, the home manufacturer of the same articles is allowed by a proviso in the 109th section of said act to simply pay an annual tax to the Commonwealth upon the capital actually employed by him in his manufacture of his articles of not less than $30.00 per annum, and, without anything further being paid for the privilege, he can, by himself or any number of agents, sell the same manufactured articles in any county or corporation of the State.

When it is remembered that there are one hundred counties in Virginia, and when it is remembered that the plaintiff pays its ad valorem tax on the capital invested in the State of Michigan, it will be seen how this Virginia license law complained of discriminates against the plaintiff and requires it to pay largely more for selling or offering to sell the same manufactured article in Virginia than is exacted from the Virginia manufacturer of the same article.

Wherefore plaintiff says that this Virginia license law, sections 108 and 109 of Acts of 1889–1890, is unconstitutional because
5 it discriminates against the plaintiff and all non-resident manufacturers. It is obnoxious to article 1, section III, of

the Constitution of the United States, commonly known as the commerce clause.

Second.

The said Virginia statute is also obnoxious to article X, section 1, of the constitution of the State of Virginia.

Third.

The Virginia statute named is obnoxious to article IV, section 2, of the Constitution of the United States.

Fourth.

The Virginia statute is obnoxious to the 14th amendment to the Constitution of the United States.

Fifth.

Because the said State tax exacted in this case has already been reviewed by this court and declared null and void in the case of Webber *v.* Virginia, 103 U. S. R., p. 344, and the act complained of, by a subsequent legislature of Virginia, amended the law in conformity with the decision of this court in the case of Webber *v.* Virginia, and they exempted sewing machines from its operations.

Sixth.

Because the honorable circuit court erred in refusing to consider as evidence in this cause the affidavits of G. W. Irvin, Eldridge, Petty, Bexler, Brown, Cox, McInturff, and Robins, agents of the plaintiff, which were filed on October 14, 1892, in this case by order of the court, found on p. 44, and which said affidavits are found on p. 43 in the transcript of the record, which are in the words and figures following, to wit:

6 "*Affidavits of G. W. Irwin and Others, Agents of Am. Harrow Co.*

Filed Oct. 14, 1892.

AMERICAN HARROW CO.
vs.
Jos. B. SHAFFER, Commissioner, *et als.*

UNITED STATES OF AMERICA,
State of Tennessee, Washington County, } *ss:*

On this 10th day of October, 1892, before me came G. W. Irwin, E. E. Eldridge, W. C. Petty, F. M. Bexler, W. S. Brown, J. D. Cox, E. E. McInturff, & W. W. Robins, agents of the American Harrow Co., in my said county, who, being by me duly sworn, depose and say that they were engaged for said company in Wythe county, Virginia, at the time the bill of The American Harrow Co. against Jos. B. Shaffer, commissioner of revenue, *et al.* was allowed, 5th

Aug., 1892; that the articles named in said bill were sold in the manner and form as described in said bill and in no other way; that the company offered to comply with the laws of Virginia, and tendered to said tax officers named the amounts of tax exacted by law from citizens of Virginia engaged in like employments, and license was refused said company on such tender; but said company was asked and demanded to pay the further and additional tax as stated in said bill, and it was this illegal and excessive tax that was refused to be paid by said company, because it discriminated unjustly against said company, a citizen of the State of Michigan, in violation of the Constitution of the United States; that the allegations of the bill were read over to affiants, and they and each of them are true.

Given under my hand and seal, at Johnson City, Washington county, Tennessee, this 10th day of October, 1892.

Subscribed by—

G. W. IRWIN.
W. C. PETTY.
E. E. McINTURFF.
F. M. BIXLER.
W. S. BROWN.
J. D. COX.
E. E. ELDRIDGE.
W. W. ROBBINS.

WM. G. MATHES,
U. S. Comm'r, Eastern District of Tennessee."

No Federal practice is better settled than that affidavits may be read on the motion to dissolve the injunction.

7 Seventh.

Because both the law and the evidence in the case show that plaintiff's bill should have been sustained and the injunction perpetuated.

Wherefore the said plaintiff prays that the said decree be reversed, and that the said court may be directed to enter a decree in accordance with the prayer of the bill.

F. S. BLAIR AND
J. C. BLAIR,
Solicitors for American Harrow Company.

8 *Citation to Appellee.*

THE UNITED STATES OF AMERICA, *To wit:*

In the Circuit Court of the United States for the Western District of Virginia, at Abingdon. In Equity.

THE AMERICAN HARROW COMPANY, Complainants,
vs.
JOS. B. SHAFFER *et al.*, Defendants. } Case # —.

To Jos. B. Shaffer, commissioner of the revenue of Wythe county, Virginia; J. L. Gleaves, the attorney for the Commonwealth for said county, and I. R. Harkrader, sheriff of the said county, Greeting:

Whereas the American Harrow Company has lately appealed to the Supreme Court of the United States from a decree lately rendered in the circuit court of the United States for the western district of Virginia, at Abingdon, made in favor of you, and has filed the security required by law, you are therefore hereby cited to appear before the said Supreme Court, at the city of Washington, on the 23d day of Feb., 1895, being within thirty days from the day of signing, to do and receive what may appertain to justice to be done in the premises.

Given under my hand, at Abingdon, Va., in the fourth
9 circuit, this the 25 day of Jan., 1895.

JOHN PAUL,
Dist. Judge.

Acceptance of Service of Citation.

I hereby, this the 26th day of Jan., 1895, do accept due personal service of this citation on behalf of all of the appellees, Shaffer, Gleaves, and Harkrader.

R. TAYLOR SCOTT,
Attorney General of Virginia, for Appellees.

10 *Appeal Bond. Filed Jan.* 25, 1895.

Circuit Court of the United States of America, Western District of Virginia.

Know all men by these presents that we, American Harrow Co., principal, and F. S. Blair, its security, are held and bound unto Jos. Shaffer, commissioner; I. R. Harkrader, sheriff, & J. L. Gleaves, Como. attorney, in the sum of five hundred dollars; for which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 25 day of January, A. D. 1895.

The condition of the above obligation is such that whereas a suit has been instituted in the circuit court of the United States of America for the western district of Virginia, at Abingdon, Virginia, by American Harrow Company, complainant, against J. B. Shaffer, commissioners, and others, defendant-, and a decree having been entered against the said American Harrow Co., and the said American Harrow Co. having obtained an appeal and supersedeas and filed a copy thereof in the clerk's office of said court, at Abingdon, to reverse the said decree in said suit, and a citation directed to the defendant- in the bill, citing and admonishing — to be and appear at a United States Supreme Court, to be holden at Washington, D. C., on the day in the said citation mentioned, Feb'y 23, 1895:

Now, therefore, if the complainant shall pay all costs which may be awarded the defendant, and also all fees due or to become due to the officers of the court in this action if it fail to prosecute its said appeal against the said defendant- with effect, then the above obligation to be void; else to remain in full force and virtue.

AMERICAN HARROW COMPANY, [SEAL.]
By F. S. BLAIR, *Its Att'y-in-fact.* [SEAL.]
F. S. BLAIR, *Surety.* [SEAL.]

Sealed and delivered in the presence of—
I. C. FOWLER.

Approved by—
JOHN PAUL,
Dist. Judge.

January 25th, 1895.

11 *Notice of Application for Injunction.*

Filed August 12th, 1892.

To J. L. Gleaves, Esqr., attorney for the Commonwealth of Virginia for Wythe county:

Take notice that on Friday, the 5th instant, at his rooms, at Atlantic City, New Jersey, we will move the Hon. H. L. Bond, judge of the circuit court of the United States for the western district of Virginia, for an injunction and restraining orders in each of the following actions at law, now pending at rules in the circuit court of Wythe county, Virginia, brought to August rules, 1892, by you as such official, against us, to wit:

Commonwealth of Virginia *vs.* G. W. Irwin, two cases;
" " *vs.* E. E. Eldridge, two cases;
" " *vs.* E. McInturff, two cases;
" " *vs.* J. D. Cox, two cases;
" " *vs.* W. C. Petty, two cases;
" " *vs.* F. W. Bixler, two cases;
" " *vs.* W. S. Brown, two cases;
" " *vs.* W. W. Robons, two cases;

and in which you have caused attachments to be issued in eight

thereof and levied on the property of our common principal, the American Harrow Company of Detroit, Michigan, who alone is interested in said suits; and said company, at the same time and place, will apply for similar orders, and we will further ask for removals of said causes from said State to said Federal court.

Very respectfully,

G. W. IRWIN,
E. ELDRIDGE,
E. McINTURFF,
J. D. COX,
W. C. PETTY,
F. W. BIXLER,
W. S. BROWN,
W. W. ROBINS, AND
THE AMERICAN HARROW CO.

Endorsed: Executed the 1 Aug., 1892, by delivering to J. L. Gleaves, Com. att'y of Wythe Co., Va., a true copy of within. I. R. Harkrader, S. W. C.

12 *Injunction Endorsed on Chancery Subpœna.*

Upon the reading of the foregoing bill, duly sworn to, it is ordered that an injunction be awarded and issued against Joseph B. Shaffer, commissioner of the revenue of Wythe county, Virginia; J. W. Repass, treasurer of said county; J. L. Gleaves, attorney for the Commonwealth of said county, and I. R. Harkrader, sheriff of said county, restraining each of said officers, their agents and deputies, and all other persons, from all further proceedings in the actions of debt in the name of the Commonwealth of Virginia against G. W. Irwin; Same *vs.* W. S. Brown; Same *vs.* W. C. Petty; Same *vs.* F. M. Bixler; Same *vs.* E. C. McInturff; Same *vs.* J. B. Cox; Same *vs.* E. E. Eldridge; Same *vs.* W. W. Robins, pending in the circuit court of Wythe county, Va., and from all proceedings under attachments ancillary thereto; and the said officers, their agents and deputies, are restrained and prohibited from all further detention of the property levied on in said actions and under said attachments by said sheriff and his deputies until the further order of this court; and the said defendants are further restrained from all further proceedings, actual and threatened, against the American Harrow Company and its agents on account of any tax required by the Va. act approved March 6th, 1890, secs. 108 & 109; but before the same shall be issued the defendants or some one for *it* shall give bond in the penalty of $250, with security or securities, to be properly approved, to answer all damages defendants may suffer by reason of the issuance of same. August 5th, 1892.

HUGH L. BOND, *Cir. Judge.*

To I. C. Fowler, clerk U. S. circuit court for W. D. of Va., at Abingdon.

A true copy.
Teste: I. C. FOWLER, *Clerk.*

Bond executed, approved, and filed as required.

I. C. FOWLER, *Clerk.*

Marshal's Return.

Executed this 12th Aug., 1892, by delivering true copies — this writ to I. R. Harkrader, sheriff, in person; a true copy of same to J. L. Gleaves, Como. attorney, in person, and by delivering to J. B. Hurt, deputy, agent, and clerk of Jos. B. Shaffer, commissioner rev., at said Shaffer's usual office in Wytheville, a true copy of same; and J. W. Repass being absent from his usual place of abode, by leaving a true copy at said place with Mrs. Greenwalt, with whom he lived. All of said deliveries of said copies were made at Wytheville, where said officers reside and have their offices.

J. G. WATTS, *U. S. M.*,
Per THEO. DUNN, *D. M.*

13 *Chancery Subpœna.*

UNITED STATES OF AMERICA,
Western District of Virginia, in the Fourth Circuit, } *ss:*

The President of the United States of America to Joseph B. Shaffer, commissioner of the revenue for Wythe county, Virginia; J. W. Repass, treasurer of said county; J. L. Gleaves, attorney for the Commonwealth of said county, and I. R. Harkrader, sheriff of said county, Greeting:

We command you and every one of you that you appear before our judges of our circuit court of the United States of America for the western district of Virginia, at the court-room in Abingdon, in said district, on the third Monday in the month of *month of* August, 1892, to answer the bill of complaint of American Harrow Company, with injunction, as per endorsement on this writ, this day filed in the clerk's office of said court in said cause, then and there to receive and abide by such judgment and decree as shall then or thereafter be made, upon pain of judgment being pronounced against you by default.

To the marshal of the western district of Virginia to execute.

Witness the Hon. M. W. Fuller, Chief Justice of the Supreme Court of the United States of America, at Abingdon, this 12 day of August, in the year of our Lord one thousand eight hundred and ninety-two, and of our Independence 117 year.

Seal United States Circuit Court, Western District of Virginia.

I. C. FOWLER, *Clerk.*

MEMORANDUM.—The above-named defendants are notified that unless they enter their appearance in the clerk's office of said court, at Abingdon aforesaid, on or before the day to which the above writ is returnable the complaint will be taken against them as confessed and a decree entered accordingly.

I. C. FOWLER, *Clerk.*

14 *Bill of Injunction.*

Filed August, 1892.

In the Circuit Court of the United States for the Western District of Virginia.

AMERICAN HARROW COMPANY *against* JOS. B. SHAFFER, Commissioner of Revenue of Wythe County, Va.; J. W. Repass, Treasurer of said County, and J. L. Gleaves, Att'y for the Commonwealth of said County, and I. R. Harkrader, Sheriff of said County.	In Equity.

To the honorable the judges of the circuit court of the United States in and for the western district of Virginia:

The American Harrow Company, a corporation organized under and pursuant to the laws of the State of Michigan and having its principal place of business in the city of Detroit, in said State, brings this its bill of complaint against J. B. Shaffer, commissioner of revenue of Wythe county, Va.; J. W. Repass, treasurer of said county, and J. L. Gleaves, att'y for the Commonwealth of said county, each of whom are officers and agents of the State of Virginia engaged in the assessment, collection, and prosecution for taxes claimed by said State in the county of Wythe, and all of whom are citizens of said county of Wythe, State of Virginia, within said judicial district, as is also I. R. Harkrader, sheriff of Wythe county.

The said Jos. B. Shaffer is the commissioner of revenue of said county of Wythe, whose duty it is to assess taxes under the laws of said State on licence and otherwise; the said J. W. Repass is treasurer of said county and as such the recipient and custodian
15 of said taxes when collected, and the said J. L. Gleaves is the attorney for the Commonwealth for said county of Wythe, and as such prosecutes for penalties and fines for breaches of the tax laws of said State in said county upon the information of said commissioner, treasurer, and otherwise. Your orator avers that, being such citizen of the State of Michigan and being entitled under the laws of said State and of the United States of America to engage in the business of selling implements and machines manufactured by it in said State of Michigan, by retail and otherwise, by its agents, it manufactured a combined harrow, cultivator, and seeder, which it has sold in said Michigan and elsewhere without let or hinderance until, as your orator avers, on the 16th day of July, 1892, it sent into Wythe county, Virginia, the following agents, to wit: G. W. Irwin, of Ohio, as its general agent and manager; W. S. Brown, as soliciting and delivery agent, of Kentucky; W. C. Petty, same; F. M. Bixler, the same, of Michigan; E. E. McInturf, same, of West Va.; J. D. Cox, same, of Indiana; E. Eldridge, same, of Michigan, and W. W. Robins, same, of Illinois, and while they were engaged in

the exercise of orator's said right, as a citizen of the United States of America, to sell said implements by sample and to deliver the same when sold in this specific manner, hereinafter named, on the 28th of July, 1892, the said J. L. Gleaves, as such attorney for the Commonwealth, instituted in the circuit court of Wythe county, Virginia, eight actions of debt in the name of the Commonwealth of Virginia against the said G. W. Irwin and said other seven agents of orator, with attachments ancillary thereto, and served the writs upon orator's said agents and levied the attachments on orator's prop-
16 erty in their possession on said 28th of July, 1892, and again on the first day of August, 1892, the said attorney for the Commonwealth brought eight more actions of debt in the name of said Commonwealth against orator's said eight agents and have served the same on said agents and levied attachments on other property of orator in their possession, each of said suits being actions of debt, claiming penalties of $100 each, which penalties and costs now exceed $2,000, and all of which is now demanded of each of orator's said agents upon the ground of a violation of sections 108, '9 of the act of the General Assembly of Virginia approved March 6th, 1890, being an act to provide for the assessment of taxes on persons, property, incomes, and on licenses to transact business, etc., found in Acts of Assembly of Virginia, 1889–'90, at page 240. Your orator avers that said suits were entered on 28th of July, 1892, and are returnable first August rules, 1892, of said court, and that in said suits, as ancillary thereto, attachments were issued and have been levied upon the wagons, horses, and goods of orator in the possession of said agents in Wythe county, Virginia.

Your orator avers that upon his arrival in the county of Wythe the said G. W. Irwin, orator's general manager, called on the said commissioner of revenue of said county, who demanded from him a license tax of thirty dollars ($30) and ten dollars for each additional agent who engaged for orator in the sale of the said manufactured impliment by retail in said county, and the said commissioner limited said privilege under said license to Wythe county alone, so that if orator sold said impliment in any other county of the State it was required to pay ten dollars for each addi-
17 tional county for each agent. Orator's said general manager and agent offered to pay to said Commonwealth of Virginia, through its said commissioner of revenue and treasurer, the same tax for licence that is assessed against residents who sell impliments or machines manufactured in Virginia and sold in Wythe county, and orator made a tender of that amount to said commissioner of revenue on the 26th day of July, 1892, but the said commissioner refused to accept said tender and demanded said tax, as aforesaid, of thirty dollars and ten dollars for each additional county for each agent, which orator declined to pay, but has kept good his tender, and orator is still willing and now again offers and tenders the amount it would owe if a proper assessment had been made against it for the privilege asked, and which is assessed for the same purposes against residents engaged in exactly the same business, who sell their own manufactured articles.

Your orator avers that the business it is engaged in and the manner in which it is conducted, and of which complaint is made by the said collecting officers of said State of Virginia for Wythe county, is this: that orator, by its agents, travels through the county with its wagons containing samples of its implíments, and its agents solicit orders for the sale of the same, and when said orders are given and said orders are approved by orator or its general manager here, then the order is filled and the implíment is delivered to the purchaser, who either pays cash for it or executes his note for the same.

18 This, your orator insists, is a right of commerce that belongs to every citizen of the United States, to sell his products in any State of the United States, and that this illegal tax imposed by the State of Virginia is contrary to the provisions of the Constitution and laws of the United States, and the tax claimed against orator for said acts of its agents is illegal and improper, and while orator was willing and tendered to the proper tax officer the tax that was required of residents engaged in similar business, orator denies that even that tax could be exacted from it for the business that orator is prosecuting in said Wythe county, Virginia.

Orator avers that the said tax complained of and by which it is wrongfully pursued in said State court is as follows:

"Agents for the sale of manufactured implíments or machines by retail, other than sewing machines.

108. Any person who shall sell or offer for sale manufactured implíments or machines by retail, other than sewing machines, unless he be the owner thereof, and duly licensed as a merchant, or takes orders therefor, on commission or otherwise, shall be deemed to be an agent for the sale of manufactured articles, and shall not act as such without taking out a licence therefor. No such person shall, under his licence as such, sell or offer to sell such article through the agency of another; but a separate licence shall be required for any agent or employee who may sell or offer to sell such article for another. For any violation of this section the person offending shall pay a fine of not less than fifty dollars nor more than one hundred dollars for each offense.

Licence to agents for the sale of manufactured implíments or machines by retail other than sewing machines.

19 109. Every agent for the sale of manufactured implíments or machines, other than sewing machines, shall pay for the privilege of transacting the business the sum of thirty dollars, and this shall give any party licence- under this section the right to sell same within the county or corporation in which he shall take out his license, and if he shall sell or offer to sell the same in any other of the counties or corporations of the State, he shall pay an additional sum of ten dollars in each of the counties or corporations where he may sell or offer to sell the same: Provided that any person who shall pay an annual tax to the Commonwealth upon capital actually employed by him in the manufacture of the articles or

machines mentioned in this section of not less than thirty dollars per annum, may, without anything further being paid for the privilege by himself or his agents, employ agents to sell said articles or machines manufactured by him in any of the counties or corporations of the State; and the certificate of the treasurer of the county or corporation, in which said tax shall be paid by such person on the capital so employed by him in the manufacture of such article or machines shall be evidence of the fact and the amount of the tax so paid by him to the State thereof."

Your honor will observe that by this last-named section the citizens of Virginia engaged in the sale of manufactured implements or machines are only required to pay a tax annually to the Commonwealth upon the capital actually employed by *him* in the manufacture of the articles or machines of not less than thirty
20 dollars at an ad valorem assessment, and may, without anything further being paid for the privilege by himself or his agents, sell such articles in any of the counties or corporations of the State, while upon the other hand the citizen of another State who manufactures his goods or implements out of Virginia and desires to sell them in the last-named State, by himself or agent, shall pay for the privilege of transacting such business the sum of thirty dollars and an additional tax of ten dollars for each additional county for each agent, and as Virginia contains one hundred counties and orator has eight agents at work in said State, it will be seen that the licence tax imposed by said act upon non-residents who sell their manufactured goods here amounts to a virtual prohibition, for the licence tax imposed by law in Virginia upon the capital invested or employed in the manufacture of articles is ten dollars for amounts not exceeding $2,000 and thirty cents on the one hundred dollars for sum- under fifty thousand dollars, and for sums and capital employed in excess of fifty thousand dollars the tax is only ten cents on the hundred dollars. See section 28 of same act, *ante*.

Your orator avers that this act is unconstitutional and void because it imposes a tax that discriminates oppressively against your orator and its products of another State, to wit, the State of Michigan, and he is advised that such unjust discrimination is unlawful, and that a State law exacting a licence tax from non-residents different and greater than that exacted from and imposed on residents of same character of business is a discriminating law and unconstitutional.

But your orator further avers that even such discrimina-
21 tion or the lack of it do not control this matter, but that if the licence tax operates upon a subject of lawful commerce the statute will be void even if it does not discriminate against the citizens and products of other States. Your orator avers that the Virginia act complained of is obnoxious to both objections, as it is both discriminating in its character and imposes an unconstitutional tax that interferes with legitimate commerce among the States.

Your orator avers that the State officers of Virginia are rigidly enforcing said acts against non-resident manufacturers, and that

your orator is now engaged in selling its said products with teams and agents, eight in number, in different parts of Wythe county, Virginia, and the said State officers have already proceeded against orator through its agents by the said eight actions named, and the same officers are now threat-ning to harass orator with many additional similar actions for penalties for the sale of said implíments in the said county of Wythe and will do so unless prevented by this honorable court; that by the attachment being levied upon the horses and wagons of orator in said county, which are used to convey and deliver said implíments to the purchasers, orator's business is greatly obstructed and will be wholly suspended by said action and said attachments which said officers are having levied on orator's said teams and implíments; and as the said officers are gentlemen of but little means, any judgments recovered against them by orator for damages for unlawful levy and detention of its property would be fruitless, and orator avers that it will suffer great and irreparable injury in its large business of dealer as afore-
22 said in the sale of said implíments unless this honorable court shall interfere, and that such injury cannot by any possibility be compensated for in damages that could be recovered from said officers, and besides your orator will be harassed, oppressed, and overwhelmed with the multiplicity of suits, all of the same character and for similar pretended violations of said unconstitutional act, and orator will be subjected thereby on account of the said multiplicity of suits and the interruption of its business by levying an attachment upon its teams to irreparable injury and to a destruction of his business of a great and valuable character.

Your orator herewith files as a part of this bill authenticated copies of the record in each of said suits against its said agents and of the attachment, with the returns thereon, levied upon the property of orator, marked "X," and prays that the same may be taken and considered as parts of this bill; and orator specifically avers and charges that the said officers have threatened and intend to bring actions against orator's said agents and to attach orator's other property and teams for penalties for each sale of said implíments sold by orator in said counties, the number of which are now numerous, in addition to the sixteen proceedings complained of in this bill.

As said statute is void as a regulation of commerce in punishing orator for engaging in the business aforesaid of soliciting orders for the sale of said implíments in the manner aforesaid and delivering the same in said counties and collecting the price therefor without obtaining the unauthorized license required by said act, and
23 for the reason that orator is harrassed with the multiplicity of suits now brought against it and is threatened with numberless others of the same character, with a most relentless pursuit after its agents engaged in said business, and for the further reason that orator has no other remedy at law by the recovery of damages from said tax officers of the said State, and orator will be subjected to great and irreparable injury, it now comes into this honorable court of equity and prays your honor for an injunction to restrain

each of the said officers and their agents and their deputies and all other persons from all other proceedings in said actions and under said attachment, and restraining and prohibiting the said officers and agents and deputies and all other persons from all further detention of the property of said company levied on in said actions and under said attachment until the further order of the court, and for a perpetual injunction restraining said parties from all proceedings, actual and threatened, against orator and its agents on account of said unauthorized license required by said act, and for general relief.

May it please your honors to grant unto your orator not only a writ of injunction conformable to the prayer of this bill, but also a writ of subpœna directed to said Jos. B. Shaffer, commissioner of revenue of Wythe county, Virginia, the assessing officer aforesaid; J. W. Repass, aforesaid tre-s. of said county; J. L. Gleaves, attorney for the Commonwealth of said county, and I. R. Harkrader, sheriff of said county, the said process in said suits and said attachments being in the hands of the said sheriff, commanding them to
24 appear and answer this bill of complaint and to abide and perform such order and decree in the premises as to the court shall seem proper and required by the principles of equity and good conscience.

AMERICAN HARROW COMPANY,
By G. W. IRWIN, *Manager.*
BLAIR & BLAIR, *Their Solicitors.*

UNITED STATES OF AMERICA, }
Western District of Virginia, } *ss:*

On this the 29th day of July, 1892, before me personally appeared G. W. Irwin, the agent and general manager of The American Harrow Company in Wythe county, the complainant above named, who, being by me duly sworn, says that he is the agent and general manager of said company for the State of Virginia and in Wythe county, Virginia, is familiar with its business, and that he has read the foregoing bill of complaint and knows the contents thereof, and that the same is true of his own knowledge except as to the matters therein stated on information and belief, and as to those matters he believes it to be true.

G. W. IRWIN, *Manager.*

Sworn to and subscribed before me this 29th of July, 1892.

SAM'L WALTER, [SEAL.]
U. S. Com'r for the Western Dist of Va., Wytheville, Va.

25 Upon the reading of the foregoing bill, duly sworn to, it is ordered that an injunction be awarded & issued according to the prayer of said bill, but before the same shall be issued the complainant or some one for it shall give bond in the penalty of two hundred & fifty dollars, with security or securities, to be prop-

erly approved, to answer all damages the defendants may suffer by reason of the issuance of same.

This Aug. 3, 1892.

HUGH L. BOND, *Cr. Judge.*

To I. C. Fowler, clerk U. S. circuit court for western district of Virginia, at Abingdon, Va.

26 EXHIBIT "X" TO BILL. Filed Aug. 12th, 1892.

Pleas before the Judge of Wythe Circuit Court.

Be it remembered that heretofore, to wit, on the 26th day of July, 1892, came the Commonwealth of Virginia, by G. L. Gleaves, attorney for the Commonwealth, of Wythe county, and sued out of the clerk's office of said court writs of summons and attachments against G. W. Irwin, W. C. Petty, W. G. Brown, & F. W. Bexler, and also sued out of said office writs of summons against E. McInturf, J. D. Cox, W. W. Robins, & E. Eldridge; which writs and returns endorsed thereon are in the following words & figures, viz:

The Commonwealth of Virginia to the sheriff of Wythe county, Greeting:

We command you to summon G. W. Irwin to appear at the clerk's office of the circuit court of Wythe, at the court-house, on the first Monday in August next, being rule day, to answer Commonwealth of Virginia of a plea in debt $100.00 (with attachment); damage, $100.00.

And have then there this writ.

Witness Wm. B. Foster, clerk of our said court, at the court-house, the 26th day of July, 1892, in the 117th year of the Commonwealth.

WM. B. FOSTER, *Clk.*

Executed July 26, 1892, by delivering a copy of the within sums. to G. W. Irwin.

J. B. HARSH, *D. S.*,
For I. R. HARKRADER, *S., W. C.*

27 VIRGINIA, *Wythe County,* } *To wit:*

To the sheriff of said county, Greeting:

Whereas The Commonwealth of Virginia, plaintiff in an action of debt now pending in the circuit court of Wythe county against G. W. Irwin, defendant in said action, *in* selling manufactured implements and machines, to wit, a New American harrow, cultivator, & seeder, by retail, not being the owner thereof and not being a duly licensed merchant, without first having taken out a license therefor, contrary to the form of statute in such cases made and provided, whereby and by force of the statute in such case made & provided

the said defendant, G. W. Irwin, has forfeited for his offense the sum of $100.00 to the said plaintiff:

These are therefore, in the name of the Commonwealth of Virginia, to require you to attach the estate of said G. W. Irwin for the said sum of $100.00, and such estate in your hands so attached to secure and so provide that the same may be forthcoming & liable to further proceedings thereupon before the circuit court of said county on the first day of the next term thereof, and that you then and there have this warrant.

Given under my hand this 26th day of July, 1892.

WM. B. FOSTER, *Clk.*

The sheriff is directed to levy this attachment upon so many of the horses, wagons, and harrows as may be necessary to satisfy the within attachment.

J. L. GLEAVES.

28 Executed July 26th, '92, by lev-in- the within attachment on three head of horses, 1 wagon & harness, & lot of cultivators & seeders & harrows.

J. B. HARSH, *D. S.*,
For I. R. HARKRADER, *S., W. C.*

The Commonwealth of Virginia to the sheriff of Wythe county, Greeting:

We command you to summons W. C. Petey to appear at the clerk's office of the circuit court of Wythe, at the court-house, on the first Monday in August next, being rule day, to answer Commonwealth of Virginia of a plea in debt, $100.00; damage, $100.00; and have then there this writ.

Witness Wm. B. Foster, clerk of our said court, at the court-house, the 26 day of July, 1892, in the 117 year of the Commonwealth.

WM. B. FOSTER, *Clerk.*

Executed July 30th, 1892, by delivering a copy of the within sums. to W. C. Petty.

J. B. HARSH, *D. S.*,
For I. R. HARKRADER, *S., W. C.*

VIRGINIA, *Wythe County,* } *To wit:*

To the sheriff of said county, Greeting:

Whereas The Commonwealth of Virginia, plaintiff in an action of debt now pending in the circuit court of Wythe county against W. C. Pettey, defendant in said action, for selling manufactured implements and machines, to wit, a New American harrow, cultivator, & seeder, by retail, not being the owner thereof and not being —

29 duly licensed merchant, without first having taken out a license therefor, contrary to the form of the statute in such cases made and provided, whereby and by force of the statute in

such cases made & provided the said W. C. Petty, defendant, has forfeited for his offence the sum of $100.00 to the said plaintiff:

These are therefore, in the name of the Commonwealth of Virginia to require *for* to attach the estate of said W. C. Petty for the said sum of $100.00, and such estate in your hands so attached to secure and to provide that the same may be forthcoming & liable to further proceedings thereupon before the circuit court of said county on the first day of the next term, and that you then & there have this warrant.

Given under my hand this 26th day of July, 1892.

WM. B. FOSTER, *Clk.*

The sheriff is directed to levy this attachment upon so many of the horses, wagons, and harrows as may be necessary to satisfy the within attachment.

July 26th, 1892.

J. L. GLEAVES.

Executed July 30th, 1892, by lev-ing the within attachment on three head of horses, one wagon & harness, & lot of harrows & cultivators.

J. B. HARSH, *D. S.*,
For I. R. HARKRADER, *S., W. C.*

The Commonwealth of Virginia to the sheriff of Wythe county, Greeting:

We command you to summon W. G. Brown to appear at the clerk's office of the circuit court of Wythe, at the court-house, on the first Monday in August next, being rule day, to answer Commonwealth of Virginia of a pl-a in debt, $100; damage, $100.00; and have then there this writ.

Witness Wm. B. Foster, clerk of our said court, at the court-house, the 26 day of July, 1892, in the 117 year of the Commonwealth.

WM. B. FOSTER, *Clerk.*

Executed July 26th, 1892, by delivering a copy of the within summon- to W. G. Brown.

J. B. HARSH, *D. S.*,
For I. R. HARKRADER, *S., W. C.*

VIRGINIA, *Wythe County,* } *To wit:*

To the sheriff of said county, Greeting:

Whereas The Commonwealth of Virginia, plaintiff in an action of debt now pending in the circuit court of Wythe county against W. G. Brown, defendant in said action, for selling manufactured implements and machines, to wit, a New American harrow, cultivator, & seeder, by retail, not being the owner thereof and not being a duly licensed merchant, without first having taken out a license therefor, contrary to the form of the statute in such cases made and provided, whereby and by force of the statute in such cases made

& provided the said defendant, W. G. Brown, has forfeited for his offence the sum of $100.00 to the said plaintiff: These are therefore, in the name of the Commonwealth of Virginia, to require you to attach the estate of said W. G. Brown for the said sum of $100.00, and such estate in your hands so attached to secure and so provide that the same may be forthcoming & liable to further pro-
31 ceedings thereupon before the circuit court of said county on the first day of the next term thereof, and that you then & there have this warrant.

Given under my hand this 26 day of July, 1892.

WM. B. FOSTER, *Clk.*

The sheriff is directed to levy this attachment upon so many of the horses, wagons, and harness as may be necessary to satisfy the within attachment.

July 26, 1892.

J. L. GLEAVES.

Executed July 26, '92, by lev-ing this attachment on three horses, one wagon, harness & lot of cultivators & harrows & seeders.

J. B. HARSH, *D. S.*,
For I. R. HARKRADER, *S.*, *W. C.*

The Commonwealth of Virginia to the sheriff of Wythe county, Greeting:

We command you to summon F. W. Bexler to appear at the clerk's office of the circuit court of Wythe, at the court-house, on the first Monday in August next, being rule day, to answer the Commonwealth of Virginia of a plea in debt $100; and have then there this writ.

Witness Wm. B. Foster, clerk of our said court, at the court-house, the 26 day of July, 1892, in the 117 year of the Commonwealth.

WM. B. FOSTER, *Clerk.*

Executed July 30, 1892, by delivering a copy of the within sums. to F. W. Bexler.

J. B. HARSH, *D. S.*,
For I. R. HARKRADER, *S.*, *W. C.*

32 VIRGINIA, *Wythe County*, } *To wit:*

To the sheriff of said county, Greeting:

Whereas The Commonwealth of Virginia, plaintiff in *in* action of debt now pending in the circuit court of Wythe county against F. W. Bexler, defendant in said action, for selling manufactured implements and machines, to wit:

A New American harrow, cultivator, & seeder, by retail, not being the owner thereof and not being a duly licensed merchant, without first having taken out a license therefor, contrary to the form of the statute in such cases made and provided, whereby and by force of

the statute in such cases made & provided the said defendant *and* F. W. Bexler has forfeited for his offence the sum of $100.00 to the said plaintiff: These are therefore, in the name of the Commonwealth of Virginia, to require *for* to attach the estate of said F. W. Bexler for the said sum of $100.00, and such estate in your hands so attached to secure and to provide that the same may be forthcoming and liable to further proceedings therefor before the circuit court of said county on the first day of the next term, and that you then & there have this warrant.

Given under my hand this 26 day of July, 1892.

WM. B. FOSTER, *Cl'k.*

The sheriff is directed to levy this attachment upon so many of the horses, wagons, and harness as may be necessary to satisfy the within attachment.

July 26, 1892.

J. L. GLEAVES.

Executed July 30th, 1892, by lev-ing the *the* within attachment on three h-ad of horses, one wagon & harness, lot of cultivators & harrows.

J. B. HARSH, *D. S.*,
For I. R. HARKRADER, *S., W. C.*

33 The Commonwealth of Virginia to the sheriff of Wythe county, Greeting:

We command you to summon E. E. McInturf to appear at the clerk's office of the circuit court of Wythe, at the court-house, on the first Monday in August next, being rule day, to answer the Commonwealth of Virginia of a plea in debt $100; damage, $100.00; and have then there this writ.

Witness Wm. B. Foster, clerk of our said court, at the court-house, the 26 day of July, 1892, in the 117 year of the Commonwealth.

WM. B. FOSTER, *Clerk.*

Executed July 30, '92, by delivering a copy of the within sms. to E. McInturf.

J. B. HARSH, *D. S.*,
For I. R. HARKRADER, *S., W. C.*

The Commonwealth of Virginia to the sheriff of Wythe county, Greeting:

We command you to summon J. D. Cox to appear at the clerk's office of the circuit court of Wythe, at the court-house, on the first Monday in August next, being rule day, to answer the Commonwealth of Virginia of a plea in debt $100; damage, $100.00; and have then there this writ.

Witness Wm. B. Foster, clerk of our said court, at the court-house, the 26 day of July, 1892, in the 117 year of the Commonwealth.

WM. B. FOSTER, *Clerk.*

Executed July 30th, 1892, by delivering a copy of the within sms. to J. D. Cox.

J. B. HARSH, *D. S.*,
For I. R. HARKRADER, *S., W. C.*

34 The Commonwealth of Virginia to the sheriff of Wythe county, Greeting:

We command you to summon W. W. Robins to appear at the clerk's office of the circuit court of Wythe, at the court-house, on the first Monday in August next, being rule day, to answer the Commonwealth of Virginia of a plea in debt $100.00; damage, $100.00; and have then there this writ.

Witness Wm. B. Foster, clerk of our said court, at the court-house, the 26 day of July, 1892, in the 117 year of the Commonwealth.

WM. B. FOSTER, *Clerk.*

Executed July 30, '92, by delivering a copy of the within sms. to W. W. Robins.

J. B. HARSH, *D. S.*,
For I. R. HARKRADER, *S., W. C.*

The Commonwealth of Virginia to the sheriff of Wythe county, Greeting:

We command you to summon E. Eldridge to appear at the clerk's office of the circuit court of Wythe, at the court-house, on the first Monday in August next, being rule day, to answer the Commonwealth of Virginia of a plea in debt $100; damage, $100.00; and have then there this writ.

Witness Wm. B. Foster, clerk of our said court, at the court-house, the 26 day of July, 1892, in the 117 year of the Commonwealth.

WM. B. FOSTER, *Clerk.*

Executed July 30, 1892, by delivering a copy of the within sms. to E. Eldridge.

J. B. HARSH, *D. S.*,
For I. R. HARKRADER, *S., W. C.*

35 And at rules held in the clerk's office of Wythe circuit court on the first Monday in August, 1892, came the Commonwealth of Virginia, by J. L. Gleaves, attorney for the Commonwealth, of Wythe county, and filed *his* declarations against the foregoing defendants in the words and figures following, to wit:

"VIRGINIA,
Wythe County, } *To wit:*

In the Circuit Court of said County.

The Commonwealth of Virginia, plaintiff, complains of G. W. Irwin, defendant, being summoned, &c., of a plea that he render unto the plaintiff $100.00, which to her he owes and from her unjustly detains, for this, that the said defendant heretofore, to wit, on

the — day of July, 1892, at the county aforesaid, did sell or offer for sale manufactured implements or machinery, to wit, a New America harrow, cultivator, and seeder, by retail, the said def't not being the owner thereof and not being duly licensed as a merchant, or did take orders therefor on commission or otherwise without first having taken out license therefor, contrary to the form of the statute in such case made and provided, whereby & by force of the statute in such cases made — provided the defendant forfeited for his said offence the sum of $100.

Nevertheless, the said defendant (though often requested) has not as yet paid the said plaintiff the said sum of money specified or any part thereof, but the same or any part thereof to the said plaintiff to pay the said defendant has hitherto wholly failed and refused and still refuses, to the damage of the plaintiff $100, and therefore she brings her suit.

J. L. GLEAVES,
Att'y for P. Q."

36 (Endorsed:) 1st August rules, 1892. Declaration filed & common order.

VIRGINIA, *Wythe County,* } *To wit:*

In the Circuit Court of said County.

The Commonwealth of Virginia, plaintiff, complains of W. C. Petty, defendant, being summoned, &c., of a plea that he render unto the plaintiff $100.00, which to her he owes and from her unjustly detains, for this, that the said defendant heretofore, to wit, on the — day of July, 1891, at the county aforesaid, did sell or offer — sale manufactured implements & machinery, to wit, a New American harrow, cultivator, & seeder, by retail, he, the said defendant, not being the owner thereof and not being duly licensed as a merchant, or the said d'f't did take orders therefor on commission or otherwise without first having taken out a license therefor, contrary to the form of the statute in such cases made & provided, whereby and by force of the statute in such cases made and provided *whereby & by force of the statute in such cases made & provided* the said def't has forfeited for his said offence the sum of $100.00.

Nevertheless the said defendant (though often requested) has not as yet paid the plaintiff the said sum of money specified or any part thereof, but the same or any part thereof to the said plaintiff to pay the said defendant has hitherto wholly failed and refused and still refuses, to the damage of the plaintiff $100.00, and
37 therefore she brings her suit.

J. L. GLEAVES,
Att'y for P. Q.

(Endorsed:) 1st August rules, 1892. Decl. filed & common order.

"VIRG., *Wythe County,* } *To wit:*

In the Circuit Court of said County.

The Commonwealth of Virginia, plaintiff, complains of W. G. Brown, defendant, being summoned, &c., of a plea that — render unto the plaintiff $100.00, which to her he owes and from her unjustly detains, for this, that the said defendant heretofore, to wit, on the — day of July, 1892, at the county aforesaid, did sell or offer for sale manufactured implements or machines, to wit, a New American harrow, cultivator, & seeder, by retail, he, the said defendant, not then being the owner thereof and not being duly licensed as a merchant, or he, the said def't, did take orders therefor, on commission or otherwise, without first having taken out a license therefor, contrary to the form of the statute in such cases made & provided, whereby and by force of the statute in such cases made & provided the said defendant forfeited for his said offence the sum of $100.00.

Nevertheless the said defendant (though often requested) has not as yet paid the plaintiff the sum of money specified or any part thereof, but the same or any part thereof to the said plaintiff to pay the said defendant has hitherto wholly failed and refused and still refuses, to the damage of the plaintiff $100.00, and therefore
38 she brings her suit.

J. L. GLEAVES,
Att'y for P. Q."

(Endorsed:) 1st August rules, 1892. Decl. filed & common order.

VIRGINIA, *Wythe County,* } *To wit:*

In the Circuit Court of said County.

The Commonwealth of Virginia, plaintiff, complains of F. W. Bexler, defendant, being summoned, &c., of a plea that he render *under* the plaintiff $100.00, which to her he owes and from her unjustly detains, for this, that the said defendant heretofore, to wit, on the — day of July, 1892, at the county aforesaid, did sell or offer for sale manufactured implements and machines, to wit, a New American harrow, cultivator, & seeder, by retail, he, the said d'f't, not being the owner thereof and not being duly licensed as a merchant, or the said d'f't did take orders therefor on commission or otherwise without first having taken out a license therefor, contrary to the form of the statute in such cases made & provided, whereby and by force of the statute in such case made and provided the defendant forfeited for his said offence the sum of $100.00.

Nevertheless the said defendant (though often requested) has not as yet paid the said plaintiff the said sum of money specified or

any part thereof, but the same or any part thereof to the said plaintiff to pay the said defendant has hitherto wholly failed and refused and still refuses, to the damage of the plaintiff $100.00, and therefore she brings her suit.

J. L. GLEAVES,
Att'y for P. Q.

39 (Endorsed:) 1st August rules, 1892. Decl. filed & common order.

VIRGINIA, *Wythe County,* } *To wit:*

In the *County* Court of said County.

The Commonwealth of Virginia, plaintiff, complains of E. E. McInturf, defendant, being summoned, &c., of a plea that he render unto the plaintiff $100.00, which to her he owes and from her unjustly detains, for this, that the said defendant, to wit, on the — day of July, 1892, at the county aforesaid, did sell or offer for sale manufactured implements & machinery, to wit, a New American harrow, cultivator, & seeder, by retail, he, the said def't, not being the owner thereof and not duly licensed as a merchant, or did take orders therefor on commission or otherwise without first having taken out a license therefor, contrary to the form of the statute in such case made and provided, whereby & by force of the statute in such cases made & provided the said def't forfeited for his said offence the sum of $100.00.

Nevertheless the said defendant (though often requested) has not as yet paid the said plaintiff the said sum of money specified or any part thereof, but the same or any part thereof to the said plaintiff to pay the said defendant has hitherto wholly failed and refused and still refuses, to the damage of the plaintiff $100.00, and therefore she brings her suit.

J. L. GLEAVES, *For P. Q.*

40 (Endorsed:) 1st August rules, 1892. Decl. filed & common order.

VIRGINIA, *Wythe County,* } *To wit:*

In the Circuit Court of said County.

The Commonwealth of Virginia, plaintiff, complains of J. D. Cox, defendant, being summoned, &c., of a plea that he render unto the plaintiff $100.00, which to her he owes and from her unjustly detains, for this, that the said defendant heretofore, to wit, on the — day of July, 1892, at the county aforesaid, did sell or offer — sale manufactured implements or machines, to wit, a New American harrow, cultivator, and seeder, by retail, he, the said defendant, not being the owner thereof and not being duly licensed as a merchant, or the said defendant did take orders therefor on commission or

otherwise without first having taken out a license therefor, contrary to the form of the statute in such cases made and provided, whereby & by force of the statute in such cases made and provided the said defendant forfeited for his said offence the sum of $100.00; nevertheless the said defendant (though often requested) has not yet paid the said plaintiff the said sum of money or any part thereof, but the same or any part thereof to the said plaintiff to pay the said defendant has hitherto wholly failed and refused and still refuses, to the damage of the plaintiff $100.00, and therefore she brings her suit.

41 J. L. GLEAVES,
Att'y for P. Q.

(Endorsed:) 1st August rules, 1892. Decl. filed & common order.

VIRGINIA, *Wythe County,* } *To wit:*

In the Circuit Court of said County.

The Commonwealth of Virginia, plaintiff, complains of W. W. Robbins, defendant, being summoned, &c., of a plea that he render unto the plaintiff $100.00, which to her he owes and from *him* unjustly detains, for this, that the said defendant heretofore, to wit, on the — day of July, 1892, at the county aforesaid, did sell or offer for sale manufactured implements or machines, to wit, a New American harrow, cultivator, & seeder, by retail, he, the said defendant, not then being the owner thereof and not being duly licensed as a merchant, or he did take orders therefor on commission or otherwise without first having taken out a license therefor, contrary to the force of the statute in such cases made and provided, whereby & by force of the statute in such case made and provided the said defendant forfeited for his said offence the sum of $100.00.

Nevertheless the said defendant (though often requested) has not as yet paid the plaintiff the said sum of money or any part thereof, but the same or any part thereof to the said plaintiff to pay the said defendant has hitherto wholly failed and refused and
42 still refuses, to the damage of the plaintiff $100.00, and therefore she brings her suit.

J. L. GLEAVES,
Att'y for P. Q.

(Endorsed:) 1st August rules, 1892. Decl. filed & common order.

VIRGINIA, *Wythe County,* } *To wit:*

In the Circuit Court of said County.

The Commonwealth of Virginia, plaintiff, complains of E. Eldridge, defendant, being summoned, &c., of a plea that he render unto the plaintiff $100.00, which to her he owes and from her unjustly detains, for this, that the said defendant heretofore, to wit, on the —

day of July, 1892, at the county aforesaid, did sell or offer — sale manufactured implements or machines, to wit, a New American harrow, cultivator, & seeder, by retail, he, the said defendant, not being the owner thereof & not being duly licensed as a merchant, or the said defendant did take orders therefor on commission or otherwise without first having taken out a license therefor, contrary to the form of the statute in such cases made and provided, whereby and by force of the statute in such cases made and provided the said defendant forfeited for his said offence the sum of $100.

Nevertheless, the said defendant (though often requested) has not as yet paid the plaintiff the said sum of money specified or any part thereof, but the same or any part thereof to the said plaintiff to pay the said defendant has hitherto wholly failed and refused and still refuses, to the damage of the plaintiff $100, and therefore she brings her suit.

43 J. L. GLEAVES,
Att'y for P. Q.

(Endorsed:) 1st August rules, 1892. Declaration filed & common order.

I certify that the annexed are true copies from the records of Wythe circuit court in the cases stated in the caption, and I further certify additional suits have been brought in said court in name of the Commonwealth of Virginia against the same parties mentioned in the record, upon which process has been issued, and returnable to the second August rules, 1892.

Witness my hand & seal of Wythe circuit court, at office, this 1st day of August, 1892.

[OFFICIAL SEAL.] WM. B. FOSTER,
Clerk of Wythe Circuit Court.

$7.87 c. fee, &c.

44 *Articles of Association.*

Filed October Term, 1892.

STATE OF MICHIGAN, } ss:
Office of the Secretary of State, }

I, G. R. Osmun, secretary of state of the State of Michigan, do hereby certify that I have compared the annexed copy of articles of association of the "Gale Sulky Harrow Manufacturing Company" with the record of the original made in this office November 18th, 1882, and that it is a true and correct transcript therefrom and of the whole of such record.

In testimony whereof I have hereto set my hand and affixed the great seal of the State of Michigan, at Lansing, this ninth day of July, in the year of our Lord one thousand eight hundred and ninety.

[Great Seal of Michigan.]

G. R. OSMUN,
Secretary of State.

Articles of Association of the Gale Sulky Harrow Manufacturing Co.

We, the undersigned, do hereby organize ourselves into a corporation for the purpose of manufacturing and selling the patented agricultural implement known as the "Gale spring-tooth sulky harrow" and other implements and articles, and for the furtherance thereof we do hereby adopt and subscribe the following articles of association:

First. The name of the corporation shall be the "Gale Sulky Harrow Manufacturing Company."

Second. The said corporation shall continue for a period of thirty years.

Third. The capital stock of said corporation shall be sixty thousand dollars ($60,000), the number of shares ten thousand four hundred of twenty-five dollars each.

Fourth. The number of directors shall be nine, and their names are as follows:

The names and residences of the stockholders and the number of shares respectively subscribed for by each are as follows:

Name of stockholders.	Residence.	No. of shares.
Berry Bros.	Detroit	120
D. M. Ferry	Detroit	200
Thomas W. Palmer	Detroit	200
George H. Gale	Albion	480
David Whitney, Jr.	Detroit	200
H. Kirk White	Detroit	200
E. Y. Swift	Detroit	200
W. W. Collier	Detroit	200
Wm. B. Moran	Detroit	200
Fred. T. Moran	Detroit	100
John V. Moran	Detroit	80
J. W. Thompson	Detroit	120
Geo. D. Hill	Detroit	100

In witnes whereof we have hereunto subscribed our names and places of residence and the number of shares of stock subscribed by us respectively this 10th day of November, A. D. 1892.

45

Names.	Residence.	Shares.
D. M. Ferry	Detroit, Mich.	200
George H. Gale	Albion, Mich.	480
D. Whitney, Jr.	Detroit, Mich.	200
H. Kirk White	Detroit, Mich.	200
E. Y. Swift	Detroit, Mich.	200
W. W. Collier	Detroit, Mich.	200
Wm. B. Moran	Detroit, Mich.	200
Fred. T. Moran	Detroit, Mich.	100
John V. Moran	Detroit, Mich.	80
Berry Bros.; per Joseph H. Berry	Detroit	120
J. W. Thompson	Detroit	120
Geo. B. Hill	Detroit	100
T. W. Palmer	Detroit	200

STATE OF MICHIGAN, } ss:
County of Wayne, }

On this 10th day of November, 1892, A. D., before me, the undersigned, appeared the above-named D. M. Ferry, George H. Gale, H. Kirk White, E. Y. Swift, W. W. Collier, William B. Moran, Fred. T. Moran, John V. Moran, Joseph Berry, of the firm of Berry Brothers; J. W. Thompson, and George B. Hill; on November 13th, 1892, Thomas W. Palmer and David Whitney, Jr., who severally acknowledged that they executed the above paper for the purposes therein mentioned.

[Great Seal of the State of Michigan.]

W. G. FORREST,
Notary Public, Wayne County, Michigan.

46 STATE OF MICHIGAN, } ss:
Office of the Secretary of State, }

I, Lewis E. Rowley, deputy secretary of state of the State of Michigan, do hereby certify that I have compared the annexed copy of amendment to the articles of association of Gale Sulky Harrow Manufacturing Company with the record of the original made in this office April 1, 1890, and that it is a true and correct transcript therefrom and of the whole of such record.

Great Seal of the State of Michigan.

In testimony whereof I have hereunto set my hand and affixed the great seal of the State of Michigan, at Lansing, this 28th day of July, in the year of our Lord one thousand eight hundred and ninety-two.

LEWIS E. ROWLEY,
Deputy Secretary of State.

47 (*Gale Sulky Harrow Co. Amendment.*)

This is to certify that at a special meeting of the stockholders of the Gale Sulky Harrow Manufacturing Company, duly called for the purpose of amending its articles of association and held at the office of the First National bank, in the city of Detroit, on the 25th day of March, A. D. 1890, the following resolution was duly adopted by a vote of more than two-thirds in interest of its capital stock duly present and voting upon said resolution, viz:

"Be it resolved—

1. That the first section of the articles of association of this corporation be so amended as to read as follows:

First. The name of this corporation shall be American Harrow Company.

2. That the third section of said articles, as heretofore amended, be further amended so as to read as follows:

Third. The capital stock of this corporation shall be three hundred thousand dollars, to be divided into thirty thousand shares of ten dollars each.

In witness whereof the said corporation has caused this resolution to be certified by its president and secretary and by a majority of its directors this 25th day of March, A. D. 1890.

D. M. FERRY, *President.*
W. W. COLLIER,
Secretary.

[SEAL.] Majority of Directors:
D. M. FERRY.
W. W. COLLIER.
RUFUS W. GILLETT.
E. Y. SWIFT.
O. A. BALDWIN.

48 *Affidavits of G. W. Irwin & Others, Agents of Am. Harrow Co.*

Filed Oct. 14, 1892.

AMERICAN HARROW CO.
vs.
JOS. B. SHAFFER, Commissioner, *et al.*

UNITED STATES OF AMERICA,
State of Tennessee, Washington County, } *ss:*

On this 10th day of October, 1892, before me came G. W. Irwin, E. E. Eldridge, W. C. Petty, F. M. Bexler, W. S. Brown, J. D. Cox, E. E. McInturff, & W. W. Robins, agents of the American Harrow Company, in my said county, who, being by me duly sworn, depose and say that they were engaged for said company in Wythe county, Virginia, at the time the bill of the American Harrow Company against Jos. B. Shaffer, commissioner of revenue, *et al.*, was allowed, 5th Aug., 1892; that the articles named in said bill were sold in the manner and form as described in said bill and in no other way; that the company offered to comply with the laws of Virginia and tendered to said tax officers named the amounts of tax enacted by law from citizens of Virginia engaged in like employments, and licence was refused said company on such tender, but said company was asked and demanded to pay the further and additional tax as stated in said bill, and it was this illegal and excessive tax that was refused to be paid by said company because it discriminated unjustly against said company, a citizen of the State of Michigan, in violation of the Constitution of the United States; that the allegations of the bill were read over to affiants, and they and each of them are true.

Given under my hand and seal, at Johnson City, Washington county, Tennessee, this 10th day of October, 1892.

Subscribed by—
G. W. IRWIN.
W. C. PETTY.
E. E. McINTURFF.
F. M. BIXLER.
W. S. BROWN.
J. D. COX.
E. E. ELDRIDGE.
W. W. ROBBINS.

WM. G. MATHES,
U. S. Comm'r, Eastern District of Tennessee.

49 *Affidavit of J. B. Shaffer, Commissioner of the Revenue.*

Filed October 15, 1892.

On the 5th day of July, 1892, G. W. Irwin, W. C. Petty, E. Eldridge, W. S. Brown, J. D. Cox, E. E. McInturff, Charles Goostsey, F. M. Bixler, W. W. Robbins, and J. D. Beckett came into my county, bringing with them ten two-horse teams and ten wagons. About the same time a car-load of harrows, cultivators, and seeders was shipped to the Wytheville depot for these men, which were taken out of the depot and stored away in a building in the town. They used eight of these teams and wagons in hauling their harrows, &c., through the county, going out the first of the week loaded and returning the last of the week empty. They claimed to be agents of the American Harrow Co., offering to sell and did sell the above-named implements, and when I demanded a license they positively refused to take out a license, saying they were only selling by sample and the law did not require them to pay a license.

Respectfully,

J. B. SHAFFER,
Com's. Rev. for Wythe County.

This Oct. 11th, 1892.

This day Jos. B. Shaffer, commissioner of the revenue, eastern district of this county, made oath before me that the statements set forth in the annexed affidavit are true, and he also subscribed the same in my presence.

Given under my hand this 14th day of October, 1892.

W. B. FOSTER,
[OFFICIAL SEAL.] *Clerk of Wythe County Court.*

Order: Leave to File Affidavits of G. W. Irwin & Others.

Filed Oct. 14th, 1892.

AMERICAN HARROW CO.
vs.
JOSEPH SHAFFER, Comm'r, *et al.*

This day came the complainant and filed by leave of the court the affidavits of G. W. Irwin & others, taken at Johnson City, Tenn.

50 *Answer of Defendants to Bill of Injunction.*

Filed October 3, 1892.

In the Circuit Court of the United States for the Western District of Virginia.

AMERICAN HARROW COMPANY
vs.
JOS. B. SHAFFER, Commissioner, *et al.*

The joint and separate answer of J. B. Shaffer, commissioner of the revenue; J. W. Repass, treasurer; I. R. Harkrader, sheriff, and J. L. Gleaves, attorney for the Commonwealth of Wythe county, in the State of Virginia, to a bill of injunction granted the "American Harrow Company," and now pending in the circuit court of the U. S. for the western district of Virginia, at Abingdon.

These respondents, reserving to themselves and to each of them all just and proper benefit of exceptions to said bill on account of the inaccuracies and errors, for answer thereto and to so much thereof as they are advised is necessary, say:

Respondents deny all, each, and every allegation of the bill touching complainant's business in the county of Wythe and the manner in which said business is and was carried on and conducted.

Further answering, these respondents say the "American Harrow Co." bought and had shipped to the county of Wythe manufactured articles, such as harrows, &c.; commingled said articles with the property of the county; stored them in boxes, depots, and other places, and then proceeded to sell and offer for sale said articles without having first obtained the licence prescribed by law for this business in manner and form set out by the revenue laws enacted by the General Assembly of the Commonwealth of Va., and then in force; that for the violation and wilful disregard of these statute laws certain persons, to wit, G. W. Irwin, W. C. Petty, W. G. Brown, F. W. Bexler, E. McInturff, J. D. Cox, W. W. Robins, and E. E. Eldridge, were prosecuted by your respondent J. L. Gleaves, who is the attorney for the Commonwealth of Virginia in the county of Wythe, and as such officer charged with the duty of enforcing the revenue laws of said Commonwealth, and said several suits in the form by said laws prescribed are pending upon the docket of Wythe county court.

Respondents are advised and charge that the statute laws and each of them under which the said prosecutions were made and suits instituted and by virtue of which they and each of them acted are constitutional, binding upon the "American Harrow Company," and valid. Therefore these respondents aver and charge that the injunction was erroneously, improvidently, unjustly, and

wrongfully granted said company, and should be dissolved, and this your respondents pray now may be done.

Respondents demand full and strict proof of each and every allegation in complainant's said bill by them denied and not herein distinctly admitted.

Having fully answered, respondents pray to be hence dismissed with their costs in this behalf wrongfully expended, and will ever pray, &c.

R. TAYLOR SCOTT,
Sol. for Respondents.

51 *Affidavit to Answer.*

STATE OF VIRGINIA, }
County of Wythe. }

This day Jos. B. Shaffer and I. R. Harkrader, the respondents, whose answer to a bill of injunction — now pending in the circuit court of the U. S. for the western district of Va., at Abingdon, obtained against them by the "American Harrow Company" and is hereto annexed, this day personally appeared before me and made oath that the statements made therein, so far as made upon their own knowledge, are true, and so far as made from information derived from others they and each of them believe them to be true.

Given under my hand this first day of October, 1892.

[OFFICIAL SEAL.] WM. B. FOSTER,
Clerk of Wythe County Court.

Endorsement: I accept service of notice to dissolve for any day that will suit att'y gen'l of Va. F. S. Blair, att'y for American Harrow Company.

Order to File General Replication.

Filed Octo. 22, 1892.

THE AMERICAN HARROW CO. }
vs.
JOS. SHAFFER, Comm'r, *et al.* }

This day came the complainant and filed its general replication to the answer in this case, and the case is continued.

Statement of J. L. Gleaves & J. B. Shaffer, Evidence for Respondents.

Filed October 10, 1894.

THE COMMONWEALTH OF VIRGINIA }
vs. } In Debt.
THE AMERICAN HARROW CO. }

The following statement of facts is submitted by counsel for def't as the facts in the above suit:

In the year 1892 there came to Wythe county, Virginia, eight or

ten men, bringing with them eight pairs of horses and wagons; that in a few days afterwards there arrived at the Wytheville depot one or more car-loads of American harrows; that these harrows were taken from the cars by these eight or more men, who represented themselves to be agents of the American Harrow Co., and stored in a building in the said town; that they then loaded their eight wagons with two harrows each and proceeded to sell and offer to sell the same throughout said county of Wythe, and when a sale was made delivering one of the harrows upon the wagon; that when a licence tax was demanded by Jos. B. Shaffer, comm'r of the revenue, they declined to pay the same, saying they were exempt from said tax by the interstate-commerce law, the said harrows being manufactured in the State of Michigan; that afterwards when told by the said commissioner of the revenue that unless the tax as prescribed by section 109, Acts of Assembly 1889–'90, regulating the amount of tax to be paid by agents for the sale of
52 manufactured implements, was paid, that he would be compelled to collect the same by law; that said agents declined to pay said tax, but expressed a willingness to pay the licence tax as prescribed by section 28 of same act, imposing a tax upon merchants, which said tax the commissioner was unwilling to accept; that upon their continuance in business, without having paid any license tax therefor, this proceeding under the statute was instituted.

Sworn to by J. L. Gleaves, att'y for Commonwealth, and Jos. B. Shaffer, commissioner rev., eastern district of Wythe county, 28th April, 1894.

Teste:

[Seal of Wythe Co. Court.]

WM. B. FOSTER, *Clerk.*

Agreement.

I agree that the above be read and used as the affidavits of J. L. Gleaves, Como. att'y, and of J. B. Shaffer, comm'r rev. of Wythe, without notice, and with same effect as tho' in form of depositions.

Apr. 28, 1894.

F. S. BLAIR,
Att'y for Am. Harrow Co.

53 *Opinion.*

Filed Jan. 26, 1895.

AMERICAN HARROW COMPANY, Complainant,
vs.
Jos. B. SHAFFER, Commissioner, &c., Defendants. } In Equity.

This is a motion to dissolve an injunction awarded on the 3rd day of August, 1892, on behalf of the complainant against Jos. B. Shaffer, commissioner of the revenue for Wythe county, Virginia;

G. W. Repass, treasurer; J. L. Gleaves, Commonwealth's attorney, and J. R. Harkrader, sheriff of said county, restraining said officers from proceeding in the circuit court of Wythe county to collect the statutory penalty for non-payment of certain licence taxes alleged to be due the Commonwealth of Virginia by the complainant and its agents.

The tax complained of was assessed under the tax law of Virginia, Acts 1889–'90, page 240, secs. 108–'9, which provides as follows: Sec. 108. "Any person who shall sell or offer for sale manufactured implements, or machines by retail, other than sewing machines, unless he be the owner thereof and duly licenced as a merchant, or takes orders therefor on commission or otherwise, shall be deemed to be an agent for the sale of manufactured articles, and shall not act as such without taking out a licence therefor. No such person shall, under his licence as such, sell or offer to sell such articles through the agency of another, but a separate licence shall be required for any agent or employee who may sell or offer to sell such articles for another. For any violation of this section the person offending shall pay a fine of not less than fifty dollars nor more than one hundred dollars for each offense."

SEC. 109. Every agent for the sale of manufactured implements or machines, other than sewing machines, shall pay for the privilege of transacting such business the sum of thirty dollars, and this shall give to any party licenced under this section the right to sell the same within the county or corporation in which he shall take out his licence; and if he shall sell or offer to sell the same in any other of the counties or corporations of the State, he shall pay an additional sum of ten dollars in each of the counties or corporations where he may sell or offer to sell the same: Provided that any person who shall pay an annual tax to the Commonwealth upon capital actually employed by him in the manufacture of these articles or machines mentioned in this section of not less than thirty dollars per annum, may without anything further being paid for the privilege by himself or his agents, employ agents to sell said articles or machines manufactured by him in any of the counties or corporations of the State and the certificate of the treasurer of the county or corporation in which said tax shall be paid by such person on the capital so employed by him in the manufacture of such articles or machines shall be evidence of the fact and the amount of tax so paid by him to the State thereon."

The bill alleges that the complainant is a corporation organized under the laws of the State of Michigan and a citizen of that State, engaged in the business of selling implements and machines manufactured by it in the State of Michigan by retail and otherwise by its agents; that it manufactures a combined harrow, cultivator, and seeder; that on the 16th day of July, 1892, it sent its agents into Wythe county to sell said implements by sample and to deliver the same; that while its agents were so engaged the tax com-
54 plained of was assessed against them; that its mode of doing business was as follows: "Your orator, by its agents, travels through the country with its wagons containing samples of its im-

plements, and its agents solicit orders for the sale of the same, and when said orders are given and said orders are approved by your orator or its general manager here (Wythe county) then the order is filled and the implements delivered to the purchaser, who either pays cash for it or executes his note for the same."

The defendants answer the bill under oath, and in their answer say:

"Respondents deny all, each, and every allegation of the bill touching complainant's business in the county of Wythe and the manner in which said business is and was carried on and conducted."

Further answering, these respondents say the "American Harrow Company brought and had shipped to the county of Wythe manufactured articles such as harrows, &c., commingled said articles with the property of the county, stored them in houses, depots, and other places, and then proceeded to sell and offer for sale said articles without having first obtained the licence prescribed by law for the business in the manner and form set out in the revenue laws enacted by the General Assembly of Virginia."

And in consequence of the complainant's agents failing to obtain such licence, actions were instituted in the circuit court of Wythe county.

The defendants Gleaves and Shaffer file a statement of facts which counsel for complainant agree may be read and used as affidavits without notice and with the same effect as though in the form of depositions. The statement is as follows:

"The following statement of facts is submitted by counsel for defendants as the facts in the above suit:

"In the year 1892 there came to Wythe county, Virginia, eight or ten men, bringing with them eight pairs of horses and wagons; that in a few days afterward there arrived at the Wytheville depot one or more car-loads of American harrows; that these harrows were taken from the cars by these eight or more men, who represented themselves to be agents of the American Harrow Company, and stored in a building in said town; that they then loaded their eight wagons with two harrows each and proceeded to sell and offer to sell the same throughout the said county of Wythe, and when a sale was made delivering one of the harrows upon the wagons; that when a licence tax was demanded by Jos. B. Shaffer, commissioner of the revenue, they declined to pay the same, saying they were exempt from said tax by the interstate-commerce law, the said harrows being manufactured in the State of Michigan; that afterwards, when told by the said commissioner of the revenue that unless the tax, as prescribed by section 109, Acts of Assembly 1889–'90, regulating the amount of tax to be paid by agents for the sale of manufactured implements, was paid that he would be compelled to collect the same by law; that said agents declined to pay the said tax, but expressed a willingness to pay the licence tax prescribed by section 28 of same act, imposing a tax upon merchants, which said tax the commissioner was unwilling to accept."

The complainant has taken no testimony to sustain the bill. It

filed the *ex parte* affidavits of some of its agents which the court cannot consider as evidence, being taken without notice to the defendants and defendants not consenting that they may be read as evidence. The cause, as presented to the court, stands upon the bill and exhibits filed therewith, showing the pendency of the proceedings in the State court, the answer of the defendants
55 under oath, and the statement of facts by the defendants Gleaves and Shaffer, which, by consent of complainant's counsel, is to be read with the same effect as if it were in the form of depositions of said defendants.

The first ground relied on by counsel for complainant to sustain the injunction in this case is that the licence-tax law, sec. 109, above quoted, is unconstitutional, in that it discriminates in favor of home manufacture-s of implements and machines and against the manufacturers of other States; that the discrimination consists in this: that sec. 109 provides that any person who shall pay an annual tax to the Commonwealth upon capital actually employed by him in the manufacture of articles or machines mentioned in said section, of not less than thirty dollars per annum, may, without anything further being paid for the privilege by himself or his agents, employ agents to sell said articles or machines manufactured by him in any of the counties or corporations of the State; but it is contended that additional licences are imposed upon persons who sell or offer to sell these goods who do not pay to the State of Virginia tax to the amount of $30.00 upon the capital invested in manufactures, such persons being required to pay a specific licence tax of $30.00, which gives them only the right to sell within one county or corporation in which the licence is taken out, and if they wish to sell or offer for sale in other counties or corporations of the State and by other agents, they are required by said section 109 to pay $10.00 for each additional county and for each additional agent, and that this is a discrimination against manufacturers of other States.

The provision of the constitution of the State of Virginia that is invoked to nullify the act in question is section 1 of article 10, which provides that "taxation, except as hereinafter prescribed, whether imposed by the State or county or corporate bodies, shall be equal and uniform, and all property, both real and personal, shall be taxed in proportion to its value, to be ascertained as prescribed by law. No one species of property from which a tax may be collected shall be taxed higher than any other species of property of equal value."

Section 4 of article X provides: "The General Assembly may levy a tax upon incomes" and upon certain licences—among others, commission merchants, persons selling by sample, brokers, pawnbrokers, and all other businesses which cannot be reached by the ad valorem system. It further provides: "The capital invested in all business operations shall be assessed and taxed as other property."

The argument of counsel is based on the ground that the tax provided for in section 109 is not equal and uniform; that it favors the manufacturer who sells by agent and who has sufficient capital

invested in his business to require him to pay $30.00 taxes thereon to the Commonwealth over one who sells the same manufactured articles by himself or agents, who has not such an amount of capital invested in the manufacturing business in this State.

It is settled by unquestioned authorities that the terms equal and uniform apply only to a direct tax on property, and that the clause by which equality and uniformity is prescribed does not limit the power of the legislature as to the subjects of taxation, but is only intended to prevent an arbitrary taxation of property according to kind or quality without regard to value. Com'th *v.* Moore & Goodsons, 25 Gratt., 898; Eyre *v.* Jacob, sheriff, 14 Gratt., 422;
56 Cooley's Const. Limt., 616, 617 (5th ed.); Sedgwick on Construc. of Statutory and Const. Law, 2nd ed., 504.

The question under discussion, viz., the power of the legislature to lay a licence tax on other than an ad valorem basis, was before the supreme court of the State of Virginia in Com'th *v.* Moore & Goodsons, 25 Gratt., 962, and was held to be constitutional.

As to the discrimination complained of, much might be said if it were within the province of the court to do so, in defense of the statute and of the wisdom and justice of the policy pursued by the legislature in its enactment. But the justice or injustice of the act is a question with which the court can have no concern. It is a matter that the constitution has confided to the judgment and discretion of the legislature.

"The rule of law upon this subject seems to be that, except where the constitution has imposed limits upon the legislative power, it must be considered as practically absolute, whether it operates according to natural justice or not, in any particular case. The judiciary can only arrest the execution of a statute when it conflicts with the constitution." Cooley's Const. Lims., 201.

"The presumption always is that the legislature has judged correctly of its constitutional powers, and the contrary must be clearly demonstrated before a co-ordinate branch of the Government can be called upon to interfere between the people and their immediate representatives." "The decisions of all the courts, State and Federal, speak a uniform language on this subject. We declare an act of the General Assembly void only when such an act clearly and plainly violates the constitution, and in such manner as to leave no doubt or hesitation on our minds." 25 Gratt., 523; 14 *id.*, 422, Eyre *v.* Jacob, sheriff.

The act under which the taxes complained of were assessed violates no provision of the constitution of Virginia, either express or implied, and contains no provision discriminating against the citizens or the manufactured articles of other States.

Counsel for complainant claim, in argument, that the statute in question has been declared to be in conflict with the Constitution of the United States in the case of Webber *v.* Virginia, 103 U. S., 344, but an examination of that case shows that the statute there decided to be unconstitutional imposed a tax on agents for the sale of the manufactured articles of other States and Territories different from that assessed upon agents for the sale of articles manufactured in

this State. That statute (45th section revenue law 1887) decided to be unconstitutional contained this provision: "That any person who shall sell or offer for sale the manufactured articles of other States or Territories, unless he be the owner thereof, and taxed as a merchant, or takes orders therefor on commission, or otherwise, shall be deemed an agent for the sale of such articles, and shall not act as such without a licence therefor." The 46th section of the same act fixed the licence tax for the sale of such articles at a rate different from that fixed for the sale of articles manufactured in this State. "Here," says the court, "is a clear discrimination in favor of home manufactures, and against the manufacturers of other States." The tax was made to depend upon the foreign character of the articles sold—that is, upon their having been manufactured without the State—and it was to that extent a regulation of commerce in the articles between the States. 103 U. S., 665.

But this discriminating provision is not embodied in the tax law we are now considering, nor is it found in any revenue statute passed by the Virginia legislature since the decision in Webber *v.* Virginia was rendered.

57 A number of decisions are relied upon by counsel for complainant to show that the Virginia statute is obnoxious to clause 3, section 8, article 1, of the Constitution of the United States, commonly known as the "commerce clause," giving to Congress the power to regulate commerce among the several States. A careful examination of the cases cited shows no provision in the statute which is inhibited by this declaration of the Federal Constitution. The case first quoted by counsel is Ward *v.* Maryland, 12 Wallace, 418. In this case the Maryland statute fixing taxes was held void because it discriminated in favor of residents and against non-residents of the State, and was in violation of the provision of the Constitution of the United States which provides that the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States. Article IV, sec. 2, clause 1, Const. United States.

Another case quoted is Wilton *v.* Missouri, 91 U. S., 275. A Missouri statute required the payment of licence tax from persons who dealt in the sale of goods, wares, and merchandise which were not the growth, product, or manufacture of the State, by going from place to *pl*ace to sell the same in the State, and required no such license tax from persons selling in a similar way goods which were the growth, product, and manufacture of the State. Walling *v.* Michigan, 116 U. S., 446, is another case in which a statute imposed a tax on non-residents or their representatives for selling liquor in the State which discriminated in favor of citizens of the State of Michigan.

It is clear that these decisions cannot be relied upon to show that the Virginia licence law is unconstitutional because it discriminates in favor of residents and against non-residents of the State. The statute makes no such discrimination. It requires the same licence tax of an agent who engages in the business of selling manufactured implements or machines, whether he be a citizen of Vir-

ginia or of another State. The cases above cited establish what enactments in licence-tax laws are discriminations in favor of the citizens of the State enacting such laws and against the citizens of sister States, and are therefore invalid as impinging upon the provision of the Constitution of the United States regulating commerce among the States.

The decisions of the Supreme Court of the United States are equally clear and conclusive as to certain provisions in State tax laws which are not in conflict with the commercial clause of the United States Constitution.

How- Machine Company *v.* Gage, 101 U. S., 754, was a case in which the plaintiff was a corporation of the State of Connecticut. It manufactured sewing machines at Bridgeport, in that State, and had an agency at Nashville, in the State of Tennessee. From the latter place an agent was sent into Sumpter county, in that State, to sell machines there. A tax was demanded from him for a pedlar's licence to make such sales. He denied the validity of the law under which the tax was claimed. The Tennessee law fixed a tax upon pedlars of sewing machines. The sewing machines were manufactured in Connecticut. The supreme court of Tennessee held that the law taxing the pedlar of such machines levied the tax on all pedlars of sewing machines without regard to the place of manufacture. The Suoreme Court of the United States sustained the decision, the court saying: "In all cases of this class to which the one before us belongs, it is a test question whether there is any discrimination in favor of the State or of the citizens of the State which enacted the law. Wherever there is such discrimination it is fatal. Other considerations may lead to the same result.

58 "In the case before us the statute in question as construed by the supreme court of the State makes no such discrimination. It applies alike to sewing machines manufactured in this State and out of it. The exaction is not an unusual or an unreasonable one. The State putting all such machines upon the same footing with respect to the tax complained of has an unquestionable right to impose the burden."

It is, however, sought by counsel for complainant to bring this case within the scope of the decision of the U. S. Supreme Court in Robbins *v.* Shelby Taxing District, 120 U. S., 489. The statute of Tennessee imposed a tax on all drummers and all persons not having a regular licensed house of business in Shelby taxing district. The facts, as stated in that case, were: Robbins was a citizen and resident of Cincinnati, Ohio, and was engaged in the business of drumming in the taxing district of Shelby county, Tennessee—*i. e.*, soliciting trade by the use of samples for the house or firm for which he worked as a drummer, said firm doing business in Cincinnati, where all the members thereof lived.

The question was as to the constitutionality of the act which imposed the tax on drummers, and the court held that it was not competent for a State to levy a tax or impose any other restriction upon the citizens or inhabitants of other States for selling or seeking to sell their goods in such State before they were introduced

therein. We have numerous decisions in the Federal courts to the same effect.

But the facts in the case now before this court do not bring it in line with that class of cases.

The evidence in this case shows these facts:

The complainant, in July, 1892, sent its agents (eight or ten of them) into Wythe county with eight teams and wagons. In a few days afterwards there arrived at the Wytheville depot, in said county, two car-loads of implements known as the "American harrow;" that these harrows were taken from the cars by these eight or more men, who represented themselves to be agents of the American Harrow Company, and stored in a building in the said town of Wytheville; that these men then loaded their eight wagons with two harrows each and proceeded to sell and offer to sell the same throughout the county of Wythe, and when a sale was made of a harrow they delivered to the purchaser one of the harrows which they had on their wagons; that when a licence tax was demanded of them they declined to pay the same, saying they were exempt from said tax by the interstate-commerce law, the said harrows being manufactured in the State of Michigan; that afterwards, when told by the commissioner of the revenue that unless the tax was paid as prescribed by section 109 of the revenue law of Acts of Assembly 1889–'90, fixing the amount of tax to be paid by agents for the sale of manufactured implements, he would be compelled to collect the same by law, they still declined to pay the same, but expressed a willingness to pay the licence tax prescribed by section 28 of said revenue law, imposing a tax upon merchants.

On this statement of facts these men do not come within the class of mercantile agents styled "drummers" or "sample merchants," selling on orders goods in another State, to be thereafter forwarded and delivered to the purchaser in the State where sold. The facts place them on a footing with citizens of the State selling goods that are within the State at the time of sale.

In Webber's case, 33 Gratt., 898, the court says: "And while it is conceded to be no easy task precicely to define when the privilege of the sample merchant begins or when it terminates, it is very clear that a person, whether he be owner or agent, who has a place of business in a county or town and there sells and
59 delivers the articles at the time of sale, or a person who carries his goods from place to place and sells and delivers the articles at the time of sale, is not selling by sample, card, or description. Such a person may be a retail merchant or a pedlar, but he is not a sample me-chant."

In the case cited by counsel for complainant, Robbins *v.* Shelby Taxing District, 120 U. S., 898, the court held that the negotiation of sales of goods which are in another State for the purpose of introducing them into the State where the negotiation is made is interstate commerce.

In the same case the court said: "As soon as the goods are in the State and become a part of its general mass of property they will become liable to be taxed in the same manner as other property of

similar character." The court held the same doctrine in Brown *v.* Huston, 114 U. S., 622.

In Howe Machine Co. *v.* Gage, 101 U. S., 676, the court said: "Where goods are sent from one State to another for sale or in consequence of a sale they become part of its general property and amenable to its laws, provided that no discrimination be made against them as goods from another State, and that they be not taxed by reason of being brought from another State, but only taxed in the usual way as other goods are."

Applying the principles so distinctly stated in these decisions to the facts in this case, no other conclusion can be reached than that the agents of the complainant were not engaged in selling harrows by sample, taking orders therefor, the orders to be sent to their principal in the State of Michigan, and the harrows so sold on orders forwarded to the purchasers. Had this been the course pursued by these agents no question could have arisen as to their liability to pay the licence tax demanded of them. They would clearly have been exempt from such tax.

But when the plaintiff shipped its harrows by car-loads from the State of Michigan into the State of Virginia, deposited these goods in a warehouse in the town of Wytheville, and then, through its agents, loaded them on wagons, sent them through the country, selling and delivering them to purchasers from the wagons, it cannot be claimed that they were engaged in interstate commerce. These goods were completely severed from the general property of the State of Michigan, were sent to the State of Virginia for sale, were commingled with the general property of the latter State, and subject to her laws. The plaintiff's agents in selling these goods in the manner they did were as clearly amenable to a licence tax as if they had been engaged as agents in selling implements and machinery manufactured in the State of Virginia. Having refused to pay the licence tax, they subjected themselves to the penalty fixed by the statute to recover which the suits were brought in the State court, the prosecution of which this court is asked to perpetually enjoin.

The contention that the Virginia statute violates art. IV, section 2, of the Constitution of the United States, which declares that "the citizens of each State shall be entitled to all the privileges and immunities of citize-s of the several States," cannot be sustained. The statute makes no discrimination in favor of citizens of Virginia and against the citizens of other States. It does not violate the privileges and immunities of the complainant and its agents as citizens of another State engaged in business pursuits in this State, but imposes upon them the same burden of taxation, and none other, that it places upon the citizens of Virginia.

Equally untenable is the proposition that the statute is in conflict with the 14th amendment, section 1, of the Federal Con-
60 stitution, which provides that "no State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States nor deny to any person within its jurisdiction the equal protection of the laws." In view of what

the court has already said on other points presented in the case, no discussion of this question is necessary.

The injunction will be dissolved, with costs to the defendants.

JOHN PAUL,
Dist. Judge.

January 24th, 1895.

61 *Final Order Dissolving Injunction and Granting Appeal.*

Filed January 25th, 1895.

AMERICAN HARROW COMPANY
vs.
J. B. SHAFFER, Comm'r, *et al.* } In Equity.

This day came the parties, by their attornies, and this cause, which was argued at the last term of this court at this place, came on to be heard upon the bill of complaint, duly verified, with all exhibits, with the order of injunction made by the hon. judge of this court, upon the affidavits of G. W. Irvin, E. E. Eldridge, W. C. Petty, F. M. Baxter, W. S. Brown, J. D. Cox, E. E. McInturff, and W. W. Robins, which, by order of 14th Oct., 1892, were filed, which affidavits were not considered as evidence by the court; upon the answer of the def'ts, with general replication thereto, and upon the affidavits of J. B. Shaffer & J. L. Gleaves, to be read as depositions.

And, upon consideration whereof and for reasons stated in writing and filed in the papers of this cause, the court doth dissolve the injunction heretofore awarded in this cause, and the further restraint of the proceedings in the circuit court of Wythe county, Va., named and enjoyed in the bill is herely removed so far as any order of this court in this cause is concerned, and the defendants will recover from complainants the costs of this cause; but the complainant signifying its purpose to appeal from this decree and having filed its petition this day for that purpose, together with an assignment of error, an appeal is allowed complainant to the Supreme Court of the United States upon executing a bond, conditioned according to law, in the penalty of $500.00 to pay the costs of said appeal if unsuccessful, which bond is approved, and a citation returnable to 23rd day of Feb., 1895, is this day issued and said appeal perfected; and it is ordered that a certified transcript of the record in this cause be furnished by the clerk of this court and be certified to the clerk of the Supreme Court of the United States for the purposes of said appeal, said appeal to operate as a supersedeas.

62 UNITED STATES OF AMERICA, }
Western District of Virginia. }

I, I. C. Fowler, clerk of the circuit court of the United States for the western district of Virginia, in the fourth circuit, at Abingdon, do certify that the foregoing is a true and complete transcript of the record and proceedings in said court under the title of cause

therein stated and described as the same are of record and on file in my said office.

Witness my hand and the seal of the said court, at Abingdon, in the district aforesaid, this the 15th day of February, A. D. 1895, and of the Independence of the United States the one hundred and nineteenth year.

Seal United States Circuit Court, Western District of Virginia.

I. C. FOWLER, *Clerk.*

[Stamped:] U. S. circuit court, W. D. of Va., at Abingdon. Feb. 15, 1895. I. C. Fowler, clerk.

Endorsed on cover: Case No. 15,798. W. Virginia C. C. U. S. Term No., 228. The American Harrow Company, appellant, *vs.* Joseph B. Shaffer, commissioner of the revenue of Wythe county, Va., *et al.* Filed February 18th, 1895.

16-718

Office Supreme Court, U. S.
FILED.
SEP 23 1896
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States,

October term, 1896.

No. 228.

THE AMERICAN HARROW COMPANY, APPELLANT,

vs.

JOSEPH B. SHAFFER, COMMISSIONER OF THE REVENUE OF WYTHE COUNTY, VIRGINIA; J. L. GLEAVES, THE ATTORNEY FOR THE COMMONWEALTH FOR SAID COUNTY; AND I. R. HARKRADER, SHERIFF OF THE SAID COUNTY.

Appeal from the Circuit Court of the United States for the Western District of Virginia.

Brief of Blair & Blair, for Appellant.

Supreme Court of the United States.

October term, 1896.

No. 228.

THE AMERICAN HARROW COMPANY, APPELLANT,

vs.

JOSEPH B. SHAFFER, COMMISSIONER OF THE REVENUE OF WYTHE COUNTY, VIRGINIA; J. L. GLEAVES, THE ATTORNEY FOR THE COMMONWEALTH FOR SAID COUNTY; AND I. R. HARKRADER, SHERIFF OF THE SAID COUNTY.

Appeal from the Circuit Court of the United States for the Western District of Virginia.

Brief of Blair & Blair, for Appellant.

STATEMENT OF CASE.

After notice of the application to Appellees, found on page 6 of the transcript, the Circuit Court of the United States for the Western District of Virginia on 5th August, 1892, awarded an injunction restraining the Appellees from all further proceedings, in certain attachment causes, instituted in the Circuit Court of Wythe County, Virginia, wherein the property of Appellant was levied upon, for a certain license tax claimed to be due the State of Virginia from Appellant. The Bill was regularly filed and will be found on page 9 of the transcript. It was duly verified by the oath of the Appellant, and was accompanied by all the exhibits. The Appellees, who were defendants below,

filed their answer found on page 30 of the transcript, and Appellant filed its general replication to the answer at the October term, 1892, see page 31 of the transcript. The only proof in the case were the affidavits of Shaffer, the Commissioner, found on page 29 of the transcript and of J. L. Gleaves on page 31 of the transcript. The Appellees, who were the defendants below, took no other proof of any kind, except the two affidavits. Appellant took and filed the affidavits of Irwin, Petty, McInturff, Bixler, Brown, Cox, Eldridge and Robbins, eight witnesses whose affidavits will be found on page 28 of the transcript, and which affidavits were filed on 14th October, 1892, *by an order of the Court found* at b. p. 29 of the transcript. Now, upon the Bill and exhibits, the answer, replication, the two affidavits for Appellees and the eight affidavits of Appellant, the Honorable Court below, on January 25th, 1895, entered its final order dissolving the injunction and decreeing costs against Appellant. From this decree Appellant asked and obtained an appeal and filed assignment of error, found on page 2 of the transcript.

THE ISSUE.

This appeal, therefore, involves the constitutionality of a tax law of the State of Virginia, approved March 6th, 1890, and found in the Acts of General Assembly of that State for the years 1889–90, at page 240, which relate to and regulate the License Tax on Manufacturers engaged in the business of selling implements and machines manufactured in other states, and sold in the State of Virginia.

The Bill in the case shows that the said Tax Law discriminates against the manufacturers of articles manufactured in other states than the State of Virginia and concisely, the discrimination consists in this: that, by a proviso

in Sec. 109 of said Act, it is enacted that any person who shall pay an annual tax to the State of Virginia upon capital actually employed by him in the manufacture of articles or machines mentioned in said section, of not less than thirty dollars per annum, may without anything further being paid for the privilege by himself or his agents, employ agents to sell said articles or machines so manufactured by him in *any* of the counties or corporations of the State. It cannot escape the attention of the Court that this proviso was directly intended for and does apply, of course, to resident manufacturers of such articles or machines. Then, the Virginia resident manufacturer, under this law, for one tax of not less than thirty dollars per annum, and for the annual tax upon the capital employed in the manufacture of such articles or machines, may, without more, sell said machines in *all* of the counties of the State, and by *as many agents* as such resident manufacturer may desire.

It is not so with the non-resident manufacturer however. An additional burden is imposed upon anyone who shall sell or offer to sell these same goods in Virginia who does not pay the ad valorem Virginia tax upon the capital invested in their manufactures. They are required to pay a specific license tax of thirty dollars, but it gives them only the right to sell *within the county or corporation in which such license is taken out;* and if they desire to sell or offer for sale their machines, in other counties or corporations of the State, other than that in which they have taken out their license, they are required by Sec. 109 of said Tax Law, to pay ten dollars for *each additional county*, and for each additional agent.

The Appellant, the American Harrow Company, being a citizen of the State of Michigan, and a resident of

of Detroit, manufacturing their harrows in that City, of course, pay taxes on their capital invested there, to the State of Michigan; and they could not be expected or required to pay a tax on their capital invested in Michigan to the tax officers of Virginia, for the privilege of selling their goods in Virginia; and yet, by the express provisions of said Sec. 109 they must do so, or pay said specific license tax of thirty dollars, and an additional tax of ten dollars for each additional county, and for each additional agent in such counties. If this Court will take any given sum of capital invested in Virginia, say $1,000.00, and estimate the tax on this capital actually invested in manufacturing harrows, at say 50 cents tax on the $100.00 of value, it will see what a fearful discrimination is wrought by this Act, there being one hundred counties and many corporations in the State; and yet for each of these, and for each agent, an additional ten dollars license tax is exacted from foreign manufacturers, who manufacture their goods in other States, but who bring their goods into this State to sell, or offer to sell.

The Court will see from the affidavits of eight witnesses, found on page 28 of the transcript, that the Appellant *tendered* to the tax officers of Virginia the amount of taxes required by the law from citizens of Virginia, engaged in *in the same business as* Appellant, and that said license was refused said Company *on such tender;* and that Appellant was asked and demanded to pay the further and additional tax of ten dollars for each additional county or corporation, and for each additional agent. The affidavits of Appellees found at the bottom of page 31 of transcript, admit that Appellant expressed his willingness to pay the license tax as prescribed by Sec. 28 of said Act, imposing a tax upon *residents*, but that the State officer was unwilling to accept it.

THE LAW.

The Federal Constitution provides that the citizens of each State shall be entitled to all of the privileges and immunities of citizens of the several States. See Article 4, Sec. 2, Par. 1. Among these privileges and immunities is that of being exempt in other States from higher taxes or impositions than are paid by citizens of such other States. Under this provision, while it is entirely admissable to levy taxes upon the business or property of non-resident traders within the State, it is not competent to require them to take out a license and to pay, therefor, *a greater sum* than that demanded of a resident.

RES ADJUDICATA.

But this same Virginia Act was before this Court in the case of Webber vs. Virginia, 103 U. S. R. p. 344. In that case, Webber, the agent of the Singer Sewing Machine Co., whose machines were manufactured in the State of New Jersey, was indicted for unlawfully selling or offering for sale those machines in Henrico County, Virginia. Webber objected to the legislation, because of its discriminating provision against non-residents. He was convicted in the court below, and the Supreme Court of Appeals of Virginia, in the case of Webber vs. Commonwealth, reported in 33rd Gratt. Va. Rep. p. 898 held, that there was nothing in the provision of that Revenue Law in conflict with the Constitution of the United States, but Webber carried said case by writ of error, to the Supreme Court of the United States, and this Court reversed the Virginia Court of Appeals and declared that the said tax law did discriminate against articles made out of the State by subjecting them to discriminating burdens. Webber's case arose under the 45th and 46th Sections of the Revenue Laws of Virginia, found in Acts of 1875–76, on pages 184 and 185, approved March

27th, 1876. The case at bar arose under Secs. 108 and 109 of the Acts, 1889–90, pp. 240–1, approved March 6th 1890, Secs. 45 and 46 of Acts 1875–6, are as follows:

"Agents for the sale of manufactured articles or machines of other states and territories."

"45. Any person who shall sell or offer for sale, the manufactured articles or machines of other states or territories, unless he be the owner thereof, and taxed as a merchant, or take orders therefor on commission or otherwise, shall be deemed to be an agent for the sale of manufactured articles of other states or territories, and shall not act as such without taking out a license therefor. No such person shall, under his license as such, sell or offer to sell such articles, through the agency of another; but a separate license shall be required from any agent or employee who may sell or offer to sell such articles for another."

"For any violation of this section, the person offending shall pay a fine not less than fifty dollars nor more than one hundred dollars for each offence."

"Tax on agents for the sale of manufactured articles or machines of other states or territories."

"46. The specific license tax upon an agent for the sale of any manufactured article or machine of other states or territories, shall be twenty-five dollars; and this tax shall give to any party licensed under this section, the right to sell the same within the county or corporation in which he shall take out his license; and if he shall sell or offer to sell the same in any other of the counties or corporations of this State, he shall pay an additional tax of ten dollars in each of the counties or corporations where he may sell or offer to sell the same. All persons, other than resident manufacturers or their agents, selling articles manufactured in this State, shall pay the specific license tax imposed by this section."

Now, these two sections passed in review before this Court in Webber vs. Virginia, 103 U. S. R. and on page 350 Mr. Justice Field, speaking for the whole Court says:

"By these sections, read together, we have this result; the agent for the sale of articles manufactured in other states must first obtain a license to sell, for which he is required to pay a specific tax for each county in which he sells or offers to sell them; while the agent for the sale of articles manufactured in the State, if acting for the manufactu-

rer, is not required to obtain a license or pay any license tax. Here there is a clear discrimination in favor of home manufacturers, and against the manufacturers of other States. Sales by manufacturers are chiefly affected through agents. A tax upon their agents when thus engaged is, therefore, a tax upon them, and if this is made to depend upon the foreign character of the articles, that is, upon their having been manufactured within the State, it is to that extent a regulation of commerce in the articles between this State. It matters not whether the tax be laid directly upon the article sold, or in the form of licenses for their sale."

The judgment of the Supreme Court of Appeals of Virginia was therefore reversed.

The Virginia Legislature then proceeded to enact Secs. 108 and 109 of Acts of 1889–90 which are in these words:

"Agents for the sale of manufactured implements or machines by retail, other than sewing machines."

"108. Any person who shall sell or offer for sale manufactured implements or machines by retail, other than sewing machines, unless he be the owner thereof, and duly licensed as a merchant, or takes orders therefor, on commission or otherwise, shall be deemed to be an agent for the sale of manufactured articles, and shall not act as such without taking out a license therefor. No such person shall, under his license as such, sell or offer to sell such article, through the agency of another; but a separate license shall be required for any agent or employee who may sell or offer to sell such article for another. For any violation of this section the person offending shall pay a fine of not less than fifty dollars nor more than one hundred dollars, for each offence."

"License to agents for the sale of manufactured implements or machines for retail, other than sewing machines."

"109. Every agent for the sale of manufactured implements, or machines, other than sewing machines, shall pay for the privilege of transacting such business the sum of thirty dollars, and this shall give to any party licensed under this section, the right to sell the same within the county or corporation in which he shall take out his license; and if he shall sell or offer to sell the same in any other of the counties or corporations of the State, he shall pay an additional sum of ten dollars in each of the counties or corporations where he may sell or offer to sell the same; provided, that any person who shall pay an annual tax to the Commonwealth upon capital actually

employed by him in the manufacture of articles or machines mentioned in this section of not less than thirty dollars per annum, may, without any thing further being paid for the privilege by himself or agents, employ agents to sell said articles or machines manufactured by him in any of the counties or corporations of the State; and the certificate of the treasurer of the county or corporation in which said tax shall be paid by such person on the capital so employed by him in the manufacture of such articles or machines, shall be evidence of the fact, and the amount of the tax so paid by him to the State thereon."

Now this last act was *an effort* on the part of the Virginia Legislature *seemingly to conform to* the *decision* of this Court, in Webber vs. Virginia; and hence in Sec. 108 it omitted the words "of other states or territories" and excluded from its provisions "sewing machines;" but the Legislature by the proviso which it inserted in Sec. 109, *accomplished exactly the same result that arose from the former law that was declared unconstitunal.* It accomplished it in this way; it provided that any person who paid an annual tax to Virginia upon the capital actually employed in the manufacture of articles or machines mentioned in those sections of not less than thirty dollars per annum, could, without paying anything more for the privilege, by himself or his agents, employ agents to sell such articles or machines manufactured by him *in any* county or corporation of the State. This means simply, that the home manufacturer who does not pay less than thirty dollars ad valorem tax, upon his capital invested in manufacturing those articles or machines mentioned, can sell them without any additional burden by himself or as many agents as he wishes in all the counties and corporations of the State of Virginia; but it is not so with the manufacturer of implements or machines of other states and territories than Virginia, who do not pay this ad valorem tax in Virginia upon their capital actually employed in the manufacture of the articles and machines mentioned.

As to them, they must pay the sum of thirty dollars license tax; and this thirty dollars only gives to the person, license and right to sell the same *within the one county or corporation* in which he could take out license; and if he would sell or offer to sell *in any other* counties or corporations, he is required to pay ten dollars additional in each of those counties or corporations. To illustrate: The Virginia manufacturer of harrows who pays an ad valorem tax upon his capital invested in the manufacture of harrows of not less than thirty dollars, can, for that thirty dollars alone, sell in the hundred counties and in say eight of said corporations of the State, his harrows; but the manufacturers of other states or territories, who do not and cannot pay this ad valorem tax upon their capital employed, because employed in other states, must pay this thirty dollars, and ten dollars for each additional county or corporation, which will amount to the thirty dollars plus ten dollars, for each of the ninety-nine counties plus ten dollars for each of said corporations, equal to Eleven Hundred Dollars; and this is an *annual* tax. We submit, that the last law with its proviso named was a *covert attempt* to accomplish the *same result* that was sought by the Act of 1875–6 and held unconstitutional by this Court.

We do not doubt, that after the decision of this Court in this cause, the Virginia Legislature will find it necessary to still reform its revenue laws, and *embrace other exceptions than sewing machines.*

The Bill of injunction in this cause, which is duly sworn to, and, under the rules of practice, must be treated as an affidavit on a motion to dissolve, and also the affidavits of the several agents and general manager of the appellant which are filed with the bill, all show that the appellant offered to comply with the said Virginia Act

to its fullest extent, in so far as it was applied to resident manufacturers, and that the appellant tendered to the tax officers of Wythe County the full amount of license tax that was exacted and required, under similar circumstances, from resident manufacturers of machines and implements, who were selling by agents in this State, and that the said tax officer refused said tender.

We might content ourselves with submitting this case on this statement of the law and fact, but this case is still stronger than above presented, as will now be seen.

The right of a non-resident to transact business in a State is secured by several clauses of the Federal Constitution and therefore the States cannot deny or abridge this right.

The most important of these clauses are:

FIRST.

Article 1. Section 8 par. 3, which is commonly called the "Commerce Clause," and which declares that Congress shall have power to regulate commerce among the several States.

SECOND.

Article 4. Section 2, "The equal privileges and immunities clause," which declares, that citizens of each state shall be entitled to all of the privileges and immunities of citizens in the several States.

THIRD.

By the 14th Amendment, Section 1, which ordains that no State shall make or enforce any law which shall abirdge the privileges or immunities of citizens of the United States; nor deny to any person within its jurisdiction the equal protection of the law.

Some of the States, with the view of protecting their own citizens from competition with non-residents engaged

in the same line of business, have attempted, by Acts like this Virginia Tax Act, to evade these fundamental provisions, but the Supreme Court of the United States has uniformley nullified said laws.

The first important case was that of Ward vs. Maryland, 12 Wallace page 418, where a Maryland statute imposed a larger license tax upon non-residents than upon residents, for selling goods by sample in Baltimore. Ward was a citizen of New Jersey and was selling harness by sample in Baltimore without paying the license tax, and he was indicted and fined four hundred dollars in the Maryland Court, but the Supreme Court of the United States reversed the judgment of the State Court, and held that the Act was unconstitutional, because it discriminated against non-resident traders: see opinion of Mr. Justice Clifford, at p. 430. The result is the same when the tax discriminates against the manufacturers of other states and such a state statute is void under the said "Commerce Clause."

The case of Welton vs. Missouri, 91st U. S. R. p. 275, involved a Missouri statute which imposed a tax for pedling merchandise not manufactured in Missouri, *but which did not impose any tax for pedling such goods manufactured in Missouri.* Welton was selling sewing machines which were manufactured outside of Missouri, was convicted by the State Court for so doing, but the Supreme Court of the United States reversed the judgment upon the ground that the statute discriminated in favor of Missouri products against the products of other states.

The case of Walling vs. Michigan, 116 U. S. R. at p. p. 446 and 459, furnishes us with a case in point. The objection to that statute was that it discriminated against

the products of other States by imposing *a larger tax* upon persons selling foreign articles, than upon those selling domestic articles, and, the Court held that that was not cured by another statute that imposed an equal or even greater tax upon the domestic manufacturer or dealer; and the reason given was that the two statutes *do not operate equally* upon the same class of persons, for the domestic manufacturer had only one tax to pay, as in the Virginia Act, and no tax was imposed on his agents or drummers, as in the Virginia Act, while the foreign manufacturer was required to pay a tax on every one and all of his agents and drummers, just exactly as is re-required by this unconstitutional Virginia Act. This decision of Walling vs. Michigan will be found very instructive on the point involved in our case, and, as we submit, fully sustains our contention.

These cases and some others countenance the idea that if residents and non-residents are both taxed *the same amount* for selling by sample; or if foreign and domestic products are taxed alike, the statute imposing such taxes would not violate the commerce clause and would be valid, because there would be no discrimination against the citizens or products of other states, but the better view, and the one supported by the later authorities, is that the *lack of such discrimination* does not prevent a State Statute from violating the commerce clause; that if the tax operates upon a subject of lawful commerce of a national character, the statute will be void, even if it does not discriminate against the citizens or products of other states.

In Robbins vs. Shelby Taxing District, 120 U. S. 489, Robbins was a drummer for a firm in Cincinnati, Ohio, and was selling, by sample, their paper and other articles of stationery in Shelby Taxing District in Tennessee,

without paying the license fee required by a Statute of Tennessee. For this offense he was convicted by the State Courts upholding the validity of the statute. The statute required citizens of Tennessee to pay the same license fee, and there was no discrimination. Held, nevertheless, that as the statute undertook to regulate the interstate commerce of a national character, it was unconstitutional and void.

In delivering the opinion of the court Mr. Justice Bradley says on p. 497: "It is strongly urged, as if it were a material point in the case, that no discrimination is made between domestic and foreign drummers, those of Tennessee and those of other states; that all are taxed alike. But that does not meet the difficulty. Interstate commerce cannot be taxed at all, even though the same amount of tax should be laid on domestic commerce, or that which is carried on solely in the State. This was decided in the case of The State Freight Tax, 15 Wall. 232. The negotiation of sales of goods which are in another state in which the negotiation is made, is interstate commerce."

A more recent case of Minnesota vs. Barber, 136 U. S. R. p. p. 313 and 326 decides that "A burden imposed by a state upon interstate commerce is not to be sustained simply because the statute imposing it applies alike to the people of all of the states, including the people of the state enacting such statute."

The following recent cases decided by the United States *Circuit Court* will also be found persuasive in their bearing on the controversy in this case, and we will proceed to give the substance of said decisions.

Where manufacturers of house-hold goods in West Virginia sent their agents into North Carolina to sell goods by sample, on the installment plan, the goods to

be delivered to each purchaser by the agent *afterwards*, the fact that the goods were to be delivered, by the agent, does not make him liable to pay tax as a pedler as prescribed by the laws of North Carolina.

In Re Spain 47th Federal Reporter p. 208.

Laws of North Carolina 1889, which provide that "Every person, a citizen of the United States, authorized to do business in this State, who is principal, or agent, peddles goods wares or merchandise, shall pay a license tax as follows," is unconstitutional as to citizens of other states as regulating interstate commerce.

In Re Spain 47th Federal Reporter p. 208.

An ordinance of the City of Titusville, Pennsylvania, requiring the payment of a license fee from all persons soliciting orders for goods, books, &c., is void as a regulation of interstate commerce, in so far as it applies to an agent soliciting orders for books to be filled on the approval of his principal in New York, notwithstanding that the books are sent from store house in Pittsburg, which is kept replenished from the main office in New York, and when such agent is imprisoned for a violation of the ordinance he is entitled to be released by the Federal Courts on a writ of Habeas Corpus.

In Re Nichols 48th Fed. Rep. 164.

In Re Tyumon 48th Fed. Rep. 167.

From the foregoing authorities, it will be seen, that the decisions of the Supreme Court of the United States as well as those of the Circuit Courts fully sustain our contention.

REMEDY.

Lastly, we are aware that it was pretended, at one time, that the *remedy* for the illegal collection of taxes was not in Equity, and that there was no ground for equitable aid by *injunction*, but the more recent cases decide otherwise, and now it is well settled that the remedy by the injunction to prevent the collection of State

taxes where there is a statutory discrimination shown, is the proper one.

Union Pacific Railroad vs. Chayenne 113 U. S. R. 516; National Bank vs. Kimball 103 U. S. R. 732; and especially Allen vs. the B. & O. Railroad Co., 114 U. S. R. 311, a Virginia case.

THE EVIDENCE.

The Honorable Court below should not have disregarded the affidavits of Appellant, as they were taken and *filed by leave of the Court*, as will be seen from page 29 of the transcript, and they were relied upon in argument of counsel, and indeed were used by consent, as were the two affidavits of the Appellees, in lieu of the depositions of the witnesses; and it was *a surpaise* to Appellant that its affidavits had been excluded. But as the motion below was to dissolve the injunction, it is settled law, that, *on motions to dissolve injunctions affidavits alone may be read;* and hence the Court erred in disregarding the same.

CONCLUSION.

So that both upon the law and the evidence in this case the Appellant should have prevailed; and it now asks that this Honorable Court reverse and annul the judgment of the Circuit Court complained of; and that this Court proceeding to render such judgment as the lower Court should have rendered, do perpetuate the said injunction.

Respectfully,

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Partners under firm and style of
BLAIR & BLAIR.
Attorneys for the Appellant.

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FILED
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CLERK.

Supreme Court of the United States.

AT WASHINGTON, D. C.

No. 228.

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THE CASE STATED.

The complainant company, through its duly appointed agents, engaged in the business of selling manufactured articles, to-wit: *harrows*, in Wythe county, in the Commonwealth of Virginia, on the —— day of ——, without having obtained the license required by law and in violation of the statute in such cases made and provided, to be found in the Acts 1889–'90, page 240, sections 108, 109, to-wit:

Sec. 108. "Any person who shall sell or offer for sale manufactured implements or machines by retail, other than sew-

ing machines, unless he be the owner thereof and duly licensed as a merchant, or takes orders therefor on commission or otherwise, shall be deemed to be an agent for the sale of manufactured articles, and shall not act as such without taking out a license therefor. No such person shall under his license as such sell or offer to sell such articles through the agency of another, but a separate license shall be required for any agent or employee who may sell or offer to sell such articles for another.

"For any violation of this section the person offending shall pay a fine of not less than fifty dollars nor more than one hundred dollars for *each* offence."

Sec. 109. "Every agent for the sale of manufactured implements or machines, other than sewing machines, shall pay for the privilege of transacting such business the sum of thirty dollars, and this shall give to any party licensed under this section the right to sell the same within the county or corporation in which he shall take out his license. And if he shall sell or offer to sell the same in any other of the counties or corporations of the State, he shall pay an additional sum of ten dollars in each of the counties or corporations where he may sell or offer to sell the same: *Provided*, that any person who shall pay an annual tax to the Commonwealth upon capital actually employed by him in the manufacture of these articles or machines mentioned in this section, of not less than thirty dollars per annum, may, without any further being paid for the privilege by himself or his agents, employ agents to sell said articles or machines manufactured by him in any of the counties or corporations of the State; and the certificate of the treasurer of the county or corporation in which said tax shall be paid by such person on the capital so employed by him in the manufacture of such articles or machines shall be evidence of the fact and the amount of tax so paid by him to the State thereon."

The complainant company was reported to J. L. Gleaves, the attorney for the Commonwealth for Wythe county, who pro-

ceeded in *the Circuit Court* to enforce the law and inflict upon the company, through its agents, the penalties imposed.

Thereupon said company applied for and obtained the injunction which is "the bone of contention" here.

The respondents moved the court to dissolve the injunction granted the complainant company—

1st. Because there is no equity in the bill;

2d. Because the injunction was wrongfully and improvidently granted;

3d. Because the evidence before the court *conclusively* establishes the validity of the license-tax law which imposed the tax upon complainant, and the proceedings in the Circuit Court of Wythe county conformed to and were required by a binding and constitutional statute—namely, sections 108, 109, Acts 1889–'90, page 240.

The Pleadings.

The case presented for the court's consideration and decree is found in the bill and its "exhibits" and the answer of the defendants, which is responsive to the bill and *under oath* affidavits, etc.

The Evidence.

In support of the bill's averments "*the exhibits*" filed.

For the respondents:

[a] The affidavit of J. B. Shaffer, com'r, &c., &c.

[b] The statements of facts made under oath by respondents J. L. Gleaves and Jos. B. Shaffer before William B. Foster, clerk of Wythe Circuit Court, 28th April, 1894; by the consent and agreement of counsel for complainant thereon endorsed, to be read and used upon the hearing of this case *as if the deposition of these witnesses were formally taken upon due notice.*

This statement, in substance, is as follows:

In the year 1892 there came to Wythe county, Virginia,

eight or ten men, bringing with them eight pairs of horses and wagons.

In a few days afterwards there arrived at the Wytheville depot one or more car loads of American harrows. These harrows were taken from the cars by these eight or more men, who represented themselves to be agents of the American Harrow Company, and stowed in a building in the said town. The men loaded their eight wagons with two harrows each and proceeded to sell and offer to sell the same through the said county of Wythe, and when a sale was made delivered one of the harrows upon the wagon. When a license-tax was demanded by Joseph B. Shaffer, commissioner of the revenue, they declined to pay the same, saying they were exempt from said tax by the inter-State commerce law, the said harrows being manufactured in the State of Michigan. Afterwards, when told by the said commissioner of the revenue that unless the tax, as prescribed by section 109, Acts of Assembly 1889–'90, regulating the amount of tax to be paid by agents for the sale of manufactured implements was paid, that he would be compelled to collect the same by law, said agents declined to pay said tax, but expressed a willingness to pay the license-tax as prescribed by "section 28" [merchant's license] of the same act imposing a tax upon merchants, which said tax the commissioner was unwilling to accept. These men continued to sell without license required by law and were proceeded against, as is shown by "the exhibit" filed with complainant's bill.

Errors Assigned.

The errors assigned, found on page 2 of the printed record, *six* in number, I will consider in their order, namely:

"*First Assignment.*" *Record, page 2.*

Counsel for appellant company contends that "*secs. 108*" *and* "*109*," Ante, of Virginia's tax-laws, are unconstitutional and void, because said statutes discriminate against the appellant company as a manufacturer. I emphasize *this fact* that

the tax complained of is "a license-tax" and not "a property tax," nor "a tax upon invented capital," and bears equally on the class of tradesmen to which it applies, vendors of manufactured articles who carry on business *in* the Commonwealth of Virginia.

In the language of Judge Paul, whose opinion will be found on page 35 of the record:

"The first ground relied on by counsel for complainant to sustain the injunction in this case is that the license-tax law, sec. 109, above quoted, is unconstitutional, in that it discriminates in favor of home manufacturers of implements and machines and against the manufacturers of other States; that the discrimination consists in this: that sec. 109 provides that any person who shall pay an annual tax to the Commonwealth upon capital actually employed by him in the manufacture of articles or machines mentioned in said section, of not less than thirty dollars per annum, may, without anything further being paid for the privilege by himself or his agents, employ agents to sell said articles or machines manufactured by him in any of the counties or corporations of the State; but it is contended that additional licenses are imposed upon persons who sell or offer to sell these goods who do not pay to the State of Virginia tax to the amount of $30.00 upon the capital invested in manufactures, such persons being required to pay a specific license-tax of $30.00, which gives them only the right to sell within one county or corporation in which the license is taken out, and if they wish to sell or offer for sale in other counties or corporations of the State and by other agents, they are required by said section 109 to pay $10.00 for each additional county and for each additional agent, and that this is a discrimination against manufacturers of other States.

The provision of the constitution of the State of Virginia that is invoked to nullify the act in question in section 1 of article X, which provides that "taxation, except that hereinafter prescribed, whether imposed by the State or county or

corporate bodies, shall be equal and uniform, and all property, both real and personal, shall be taxed in proportion to its value, to be ascertained as prescribed by law. No one species of property from which a tax may be collected shall be taxed higher than any other species of property of equal value."

Section 4 of article X provides: "The General Assembly may levy a tax upon incomes" and upon certain licenses—among others, commission merchants, persons selling by sample, brokers, pawnbrokers, and all other businesses which cannot be reached by the ad valorem system. It further provides: "The capital invested in all business operations shall be assessed and taxed as other property."

The argument of counsel is based on the ground that the tax provided for in section 109 is not equal and uniform; that it favors the manufacturer who sells by agent and who has sufficient capital invested in his business to require him to pay $30.00 taxes thereon to the Commonwealth over one who sells the same manufactured articles by himself or agents, who has not such an amount of capital invested in the manufacturing business in this State.

It is settled by unquestioned authorities that the terms equal and uniform apply only to a direct tax on property, and that the clause by which equality and uniformity is prescribed does not limit the power of the legislature as to the subjects of taxation, but is only intended to prevent an arbitrary taxation of property according to kind or quality without regard to value.

Com'th v. *Moore & Goodsons*, 25 Gratt., 898.

Eyre v. *Jacob*, sheriff, 14 Gratt., 422.

Cooley's Constl. Limt., 616, 617 (5th ed.).

Sedgwick on Construc. of Statutory and Constl. Law (2d ed.), 504.

The question under discussion, viz., the power of the legislature to lay a license-tax on other than an ad valorem basis, was before the Supreme Court of the State of Virginia in

Com'th v. *Moore & Goodsons*, 25 Gratt., 962, and was held to be constitutional.

As to the discrimination complained of, much might be said if it were within the province of the court to do so, in defense of the statute and of the wisdom and justice of the policy pursued by the legislature in its enactment. But the justice or injustice of the act is a question with which the court can have no concern. It is a matter that the constitution has confided to the judgment and discretion of the legislature.

"The rule of law upon this subject seems to be that, except where the constitution has imposed limits upon the legislative power, it must be considered as practically absolute, whether it operates according to natural justice or not, in any particular case. The judiciary can only arrest the execution of a statute when it conflicts with the constitution." *Cooley's Constl. Lims.*, 201.

"The presumption always is that the legislature has judged correctly of its constitutional powers, and the contrary must be clearly demonstrated before a co-ordinate branch of the Government can be called upon to interfere between the people and their immediate representatives." "The decisions of all the courts, State and Federal, speak a uniform language on this subject. We declare an act of the General Assembly void only when such an act clearly and plainly violates the constitution, and in such manner as to leave no doubt or hesitation on our minds." 25 Gratt., 523; 14 *Id.*, 422, *Eyre* v. *Jacob*, sheriff.

The act under which the taxes complained of were assessed violates no provision of the Constitution of Virginia, either express or implied, and contains no provision discriminating against the citizens or the manufactured articles of other States."

"*Second Assignment.*" *Record, page 3.*

The said Virginia statute is also obnoxious to article X, section 1 of the constitution of the State of Virginia.

This section is as follows:

"Taxation, except as hereinafter prescribed, whether imposed by the State, or county, or corporate bodies, shall be equal and uniform, and all property, both real and personal, shall be taxed in proportion to its value, to be ascertained as prescribed by law. No one species of property, from which a tax may be collected, shall be taxed higher than any other species of property of equal value."

I answer, this tax is not rated *ad valorem*, but *a license tax* levied upon subjects which cannot be reached by *the ad valorem* system, therefore not within the meaning and intent of "*section 1*" but laid under "*section 4*," which empowers the General Assembly to levy a tax upon "the following licences, * * persons selling by samples, brokers and pawnbrokers, and *all other businesses which cannot be reached* by the *ad valorem* system," held to be constitutional by the Supreme Court of Appeals of Virginia in "COMMONWEALTH AGAINST MOORE AND GOODSONS" [25 G. 951–962], which ruling is binding upon and must be followed by this court.

Amy v. *Watertown*, *No. 1*, 130 U. S., 320.
Louisville, &c., R. R. Co. v. *Miss.*, 133 U. S., 587.
In re Duncan, 139 U. S., 449.

Third Assignment. Record, page 3.

The Virginia statute named is obnoxious to article IV, section 2 of the Constitution of the United States which ordains "That the citizens of each State shall be entitled to all *the privileges* and *immunities* of citizens of the several States."

If my argument in reply to the "*First Assignment*" of error is sound, then it also answers *this* assignment, because it is impossible that *the constitutional* exercise of legislative power by the General Assembly of Virginia can deprive the appellant company of any right to which it is entitled under this provision of the Federal Constitution.

Fourth Assignment. Record, page 3.

The Virginia statute is obnoxious to *the XIV Amendment* to the Federal Constitution.

What *this* amendment to the Federal Constitution has to do with this contention is beyond my power to understand or apprehend. It is wholly without point or application so far as I can see.

Fifth Assignment of Error. Record, page 3.

I answer this with the well considered words of the learned trial-judge, to be found on page 36 of the record.

"Counsel for complainant claim, in argument, that the statute in question has been declared to be in conflict with the Constitution of the United States in the case of *Webber* v. *Virginia*, 103 U. S., 344, but an examination of that case shows that the statute there decided to be unconstitutional impose a tax on agents for the sale of the manufactured articles of other States and Territories different from that assessed upon agents for the sale of articles manufactured in this State. That statute (45th section revenue law 1887) decided to be unconstitutional contained this provision: "That any person who shall sell or offer for sale the manufactured articles of other States or Territories, unless he be the owner thereof, and taxed as a merchant, or takes orders therefor on commission, or otherwise, shall be deemed an agent for the sale of such articles, and shall not act as such without a license therefor." The 46th section of the same act fixed the license-tax for the sale of such articles at a rate different from that fixed for the sale of articles manufactured in this State." "Here," says the court, "is a clear discrimination in favor of home manufactures, and against the manufacturers of other States." The tax was made to depend upon the foreign character of the articles sold—that is, upon their having been manufactured without the State—and it was to that extent a regulation of commerce in the articles between the States. 103 U. S., 665.

But this discriminating provision is not embodied in the tax law we are now considering, nor is it found in any revenue statute passed by the Virginia legislature since the decision in *Webber* v. *Virginia* was rendered."

Sixth Assignment. Record, page 3.

I have given this honorable court, in my statement of the case, *the "Pleadings"* and the "*Evidence*" as shown by the record. These "affidavits" constitute no part of the "*Pleadings*" nor of the "*Evidence*," therefore were properly not considered.

Manifestly and clearly they are *ex-parte* affidavits made October 10, 1892, when this suit was begun.

The answer of appellees was filed 3d October, 1892, order for general replications entered the 22d day of that month (Record, page 31) and final decree made January 25, 1895, *more than two years thereafter!*

The statements of Mr. Gleaves and Mr. Shaffer (Record, page 31) stand as their "*evidence*" by virtue of the agreement of counsel for appellant (Record, page 32), but as to the "affidavits" of *G. W. Irvin and als.*, set out in this exception, no such agreement was made. They are "*ex-parte* affidavits" and not "*evidence*" properly before and to be considered by the trial court when the decree complained of was made.

The proposition that "no Federal practice is better settled than that affidavits may be read on motion to dissolve the injunction," contended for by counsel for appellant (Record, page 4), is confined and restricted to "preliminary motions" and "interlocutory decrees." The "affidavits" found in this exception are no part of the record before the trial and this court because there was no agreement that they should be, and no bill of exceptions wherein they are incorporated as required by the rule and practice of this court.

Baltimore & P. R. R. Co. v. *Sixth Presbyterian Church*, 91 U. S., 197.

Evans v. *Stettnisch*, 149 U. S., 605.

Seventh Assignment, Record, page 4.

The "evidence" introduced by the parties to this controversy is before the court and as I read and understand it, needs no vindication at my hands.

This has been done and well done, by JUDGE JOHN PAUL in his lucid, able and exhaustive discussion of this case in his opinion, made part of the record and found on pages 32 to 41.

Though not of the numbered and specified assignments of error, at the conclusion of the "*First*" assignment (Rec. p. 3) is found this paragraph:

"Wherefore plaintiff says that this Virginia license law, secs. 108 and 109, acts of 1889–90 is unconstitutional because * * it is obnoxious to Act I, sec. VIII, *subsection 3*, of the Federal Constitution," *which bestows upon Congress the power* "*To regulate commerce with foreign nations and among the several States, and with the Indian tribes.*"

In the trial court—

Ward v. *Maryland*, 12 Wall., 481.
Welton v. *Missouri*, 91 U. S., 275.
Walling v. *Michigan*, 116 U. S., 446.
Robbins v. *Shelby County Tax'g Dis.*, 120 U. S. 489.
Western Union Tel. Co., v. *Texas*, 105 U. S. 464, were cited and relied upon to sustain this contention.

In *Ward* v. *Maryland*, *Welton* v. *Missouri*, *Walling* v. *Michigan*, and *Robbins* v. *Shelby County Tax'g Dist.*, the statute of *each* State *discriminated* between the citizens of the State and citizens of the sister States of the Federal Union. Virginia's statutes make no discrimination, but lay the license tax upon *all* who carry on this business within her territorial limits—her own people and those who come from *without*.

Minnesota v. *Barber*, 136 U. S., 313.
Brimmer v. *Rebman*, 138 U. S., 78, and
Wes't Union Tel. Co. v. *Texas*, 105 U. S., 464,

So far as *I* can see, have nothing in common with and no bearing upon this case.

Since these cases were determined this court has decided *Ficklen* v *Shelby Co. Tax'g Dist.*, [145 U. S. 1–28], a companion

to *Robbins* v. *Same Dist. supra*, and *this case* is ruled by the principles determined in *Ficklin* v. *Shelby County Taxing District*.

The defendants proved, and this evidence is not controverted or disputed, that the complainant company, a foreign corporation, brought into the county of Wythe "manufactured articles" *harrows &c.*, put them in a warehouse at Wytheville, commingled this merchandise with the property of the citizens of that town and county, and by duly appointed agents sold, *not by sample*, but *the specific manufactured article*, and when sold, delivered the article to the purchaser without paying the license tax by law imposed upon this business.

In the language of *Chief Justice Fuller*, in Ficklin's case, "*this tax is not on the goods or on the proceeds of the goods, nor is it a tax on non-resident merchants; and if it can be said to affect inter-State commerce in any way, it is incidentally and so remotely as not to amount to a regulation of commerce.*"

Howe Machine Co. v. *Gage*, 101 U. S., 676
Pullman Car Co. v. *Penna.*, 141 U. S., 18–36.
Same v. *Hayward*, 141 U. S., 18–36.
Western Union Tel. Co. v. *Adams, &c.*, 141 U. S., 40.
Postal Tel. Co. v. *Adams*, 155 U. S., 688.

"*The States*," said MR. J. SWAYNE in "*Gilman* v. *Philadelphia*," 70 U. S. (3 Wall), 713–744, may exercise concurrent or independent power in all cases but *three:*

1. Where the power is lodged *exclusively* in the Federal Constitution.

2. Where it is given to the *United States* and *prohibited* to the States.

3. Where from the nature and subjects of the power it must necessarily be exercised by the National Government "*exclusively.*"

Virginia's "license tax-law" does not fall within any of these exceptions.

Quoting again from Judge Paul: "On this statement of facts these men do not come within the class of mercantile agents styled 'drummers' or 'sample merchants' selling on orders goods in another State to be thereafter forwarded and delivered to the purchaser in the State where sold. The facts place them on a footing with citizens of the State selling goods that are within the State at the time of the sale." (Rec. p. 39.)

However viewed the judgment of the trial court was right, and should be affirmed.

I deferred preparation of this brief until *to-day* (March 20, 1897,) that I might be advised by counsel for appellant company of arguments and authorities relied on to sustain "the assignments of error," but I am in ignorance of what he will say at the trial and unable to criticise his authorities and make reply to his arguments.

R. TAYLOR SCOTT,

Attorney-General of Virginia.

RICHMOND, VA., *March 20, 1897.*